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No.
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IN THE SUPREME COURT OF THE UNITED STATES

ERNIE ROE, Warden, *Petitioner,*

v.

JOAQUIN LESO FERNANDEZ, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
PETER QUON, JR.
Supervising Deputy Attorney General
KARL T. TERP
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2194
Fax: (619) 645-2191
Counsel for Petitioner

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QUESTIONS PRESENTED

In *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, this Court set out a three step process for contesting an opposing party's exercise of a peremptory challenge with the first step requiring the moving party to make a prima facie showing of an inference of purposeful discrimination. In the instant case, the federal circuit court ruled that the state courts failed to apply this Court's clearly established law because the state courts neither cited to nor quoted from *Batson* when ruling Fernandez failed to establish a prima facie showing. The Circuit Court then conducted its own proportionality analysis and found, on that basis alone, a prima facie showing had been presented by the moving party. The questions presented are:

1. Must a trial or appellate court recite this Court's specific *Batson* language or reference *Batson* when finding the lack of a prima facie showing of discriminatory jury selection and is a failure to do so contrary to clearly established federal law by this Court?

2. When the moving party of a *Batson* motion only nominally addressed the racial composition of the jury without a proportionality or statistical analysis, did the Ninth Circuit err in requiring the trial court to perform such an analysis for purposes of review under the AEDPA?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

ERNIE ROE, Warden, *Petitioner,*

v.

JOAQUIN LESO FERNANDEZ, *Respondent.*

Ernie Roe, Warden [hereinafter State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on April 8, 2002. The opinion is reported at 286 F.3d 1073 (9th Cir. 2002). A copy of the opinion is attached to this petition, as Appendix H. On May 8, 2002, Petitioner-Appellee's motion to stay issuance of the mandate, was granted, and the mandate which issued on April 29, 2002, was recalled. The jurisdiction of this Court is invoked under 28 U.S.C. section 2254(1).

CONSTITUTION, STATUTES, OR REGULATIONS

United States Constitution, amend. XIV.

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA) 28 U.S.C. section 2254 et seq.

STATEMENT OF THE CASE

During the early morning hours of January 30, 1994, Fernandez, a member of the Los Asesinos gang, was involved in the stabbing murder of Tony Salazar, who was a member of the Brown Knights rival gang. Fernandez had been cruising with friends when they came upon members of the Brown Knights rival gang, and the two gangs exchanged words and gang signs. Fernandez drove up to the Brown Knights and stopped his car in the middle of the street. The members of the Brown Knights ran away. Fernandez, along with three fellow gang members, gave chase. Appendix C at 22-23.

When Fernandez and his fellow gang members returned to the car, one of Fernandez's cohorts had blood on his hands and stated he had stabbed Salazar. The knife was thrown into a nearby restaurant parking lot. A woman who witnessed the encounter saw a group of individuals fighting, and when the group fled, Salazar was lying on the ground by a tree, asking for help. Salazar suffered seven stab and slash wounds but died of a stab wound to his heart. Appendix C at 23-24.

During jury selection, the trial court denied Fernandez's motions contesting the prosecutor's exercise of two peremptory challenges on the basis of group bias. Appendix A at 3-12; Appendix B at 13-19. The jury convicted Fernandez of second degree murder (Cal. Penal Code § 187) and one count of conspiracy to commit murder (Cal. Penal Code §§ 182/187). Appendix C at 21. The Superior Court of California (County of Riverside) imposed a sentence of 15 years to life for each offense, but stayed imposition of the sentence for conspiracy. Appendix C at 21.

Fernandez appealed to the California Court of Appeal, which affirmed the judgment regarding second degree murder,

reversed the conviction for conspiracy to commit murder and rejected Fernandez's claim that he had made a prima facie showing the prosecutor improperly exercised a peremptory challenge on the basis of group bias. Appendix C at 24-30. Fernandez's two petitions for writ of habeas corpus to the California Supreme Court were denied. Cal. Sup. Order.[1/]

Based on an application made pursuant to 28 U.S.C. section 2254, the United States District Court for the Central District of California denied relief on several grounds raised by Fernandez, including Fernandez's challenge to the prosecutor's exercise of peremptory challenges. The district court ruled Fernandez failed to establish the California Court of Appeal's determination of the claim was contrary to, or involved an unreasonable application of, clearly established federal law, or that it was based upon an unreasonable determination of the facts. Appendix D at 49-59; Appendix E at 70. Subsequently, the United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court and remanded the matter with instructions to the district court to conduct an evidentiary hearing to determine whether the trial court committed *Batson* error.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Ninth Circuit erroneously held the state trial court's findings were contrary to this Court's established law because the state court did not use the exact language of *Batson* or cite to it when rejecting Fernandez's prima facie showing contesting the

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1. The California Supreme Court orders denying Fernandez's petitions currently cannot be located in the State's record, but they are unnecessary for the court's determination at this stage. However, they can be obtained should this Court grant certiorari.

prosecutor's exercise of a peremptory challenge on the basis of group bias.

2. The United States Court of Appeals for the Ninth Circuit failed to conduct review pursuant to established authority by this Court applying the AEDPA and justified its reversal of a state court conviction by relying upon a proportionality analysis which has no basis in law established by this Court.

ARGUMENT

I.

THE STATE TRIAL AND APPELLATE COURT'S FAILURE TO CITE OR INVOKE THIS COURT'S LANGUAGE ARTICULATING THE STANDARD FOR ESTABLISHING A PRIMA FACIE SHOWING UNDER *BATSON V. KENTUCKY* WAS NOT CONTRARY TO FEDERAL LAW AS ESTABLISHED BY THIS COURT

In the instant case, the Ninth Circuit Court of Appeals found the State trial and state appellate courts applied an incorrect legal standard in deciding whether a prima facie showing had been made that an opposing party had exercised a peremptory challenge during jury selection on the basis of group bias. To arrive at this conclusion, the Ninth Circuit found the moving party's burden of proving a prima facie showing, as articulated in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), was contrary to this Court's holding in *Batson v. Kentucky*, 476 U.S. at 106. However, this reasoning does not withstand scrutiny and fails to comport with review consistent with the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (the AEDPA).

Because Fernandez filed his petition following the enactment of the AEDPA, the district court denied it pursuant to 28 U.S.C. section 2254, after finding the State court decisions were neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by this Court. Appendix D at 43-69; Appendix F at 71-72. Applying a de novo standard of review, the Ninth Circuit reversed the decision of the district court. Appendix H at 89-101.

Recently, this Court addressed claims akin to those in the instant case in the context of a claim of ineffective assistance counsel. *Bell v. Cone*, __ U.S. __ , 122 S. Ct. 1843, __ L. Ed. 2d __ (2002). In *Bell*, this Court addressed whether the State court's application of *Strickland* was "contrary to" or "an unreasonable application of" this Court's established law. First, this Court found the state appellate court applied federal law consistent with established precedent by this Court, reversing the Circuit court's determination to the contrary. *Id.* at 1849-52. Then this Court found the State court's determinations were not an unreasonable application of established authority by this Court. *Id.* at 1852-54. These principles apply to both issues raised in the instant petition but they do not support the Ninth Circuit's disposition.

28 U.S.C. section 2254(d)(1) provides that an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court. Federal law as determined by this Court refers to "the holdings, as opposed to the dicta of the Court's decisions as of the time of the relevant state court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The federal court independently determines whether a rule is "clearly established" for this purpose. *Id.* at 382. To make this determination, the federal court employs the same analysis used to determine whether a rule is "old" under the doctrine of *Teague v. Lane*,[2] except that the court looks only to this Court's jurisprudence. *Id.* at 380-84, 412, 416. Therefore, for section 2254(d)(1) purposes, a rule is "clearly established" if it is "'dictated by precedent existing at the time the defendant's conviction

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2. 489 U.S. 288 (1989).

became final.'" *Williams*, 529 U.S. at 381, *quoting Teague*, 389 U.S. at 301.

In this context, the law articulated by this Court for purposes of the instant case is clearly established. In *Batson*, 476 U.S. at 96-98, and its progeny, this Court set out a three step process for contesting an opposing party's exercise of a peremptory challenge to jury selection based upon group bias. Jury selection based on group bias violates the Equal Protection Clause. The first step requires the moving party to establish a prima facie showing of selection based on group bias. *Batson*, 476 U.S. at 96-97. A prima facie showing requires establishing, through a combination of factors, that the opposing party's peremptory challenge raised "the necessary inference of purposeful discrimination." *Id.* at 96. However, while this Court in *Batson* discussed the initial requisite prima facie showing, it neither defined the term "inference" of purposeful discrimination nor prescribed a formula for establishing this necessary inference. *Id.* at 91-97, 99. In fact, this Court declined to formulate a particular procedure for courts to follow upon timely objection to the exercise of a peremptory challenge by the opposing party. This Court acknowledged the variety of jury selection practices followed in state and federal courts and expressly abstained from instructing on how to implement its holding in *Batson*. *Id.* at 99 including n.24. The courts in California recognize *Batson* as clearly established law and consistently apply it.

California Supreme Court decisions indicate the standard set forth regarding a prima facie showing in *Batson* and its progeny is the same as the one set forth in *Wheeler*, and its progeny. *People v. Farnam*, S010808, 2002 WL 1271498, *7 (Cal. 4th Jun. 10, 2002); *People v. Box*, 23 Cal. 4th 1153, 1187-88, 5 P.3d 130, 99 Cal. Rptr. 2d 69 (2000); *People v. Crittenden*, 9 Cal. 4th 83, 115, 885 P.2d 887, 36 Cal. Rptr. 2d 474 (1994). In fact, this Court in *Batson* referenced *Wheeler*, 22 Cal. 3d at 258 as a positive example showing proper implementation of the principles of law it addressed; *Wheeler* and its progeny are the very California Supreme Court cases

with which the Ninth Circuit now takes umbrage. *Batson*, 476 U.S. at 82 n.1, 83-84, 92 n.17. Additionally, this Court in *Batson* cited another California Supreme Court case as a positive example of a state "applying a version of the evidentiary standards we recognize today. . . ." by referencing *People v. Hall*, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983). *Batson*, 476 U.S. at 99 n.23. The decision in *Hall* simply applied the principles set forth in *Wheeler*. Therefore, *Batson* could be considered a progeny to *Wheeler*.

The California Supreme Court recently addressed the requisite initial prima facie showing by citing *Batson* and stating "the defendant must show a ***strong likelihood*** or ***reasonable inference*** that such persons are being challenged because of their group association." *People v. Farnam*, 2002 WL 1271498, *7; emphasis added. The California Supreme Court in *People v. Jenkins*, 22 Cal. 4th 900, 993, 997 P.2d 1044, 95 Cal. Rptr. 2d 377 (2000) acknowledged and used the "raise an inference" language from *Batson* and later explained in *Box*, 23 Cal. 4th at 1188 (including footnote 7), the *Batson* phrase means the same as the phrase "show a strong likelihood" which was additionally used in *Wheeler*. In the instant case, the Ninth Circuit erred by finding the State courts' decisions were contrary to clearly established federal law as determined by this Court. See 28 U.S.C. section 2254(d)(1).

Williams and *Bell* both addressed the distinction between the "contrary to" and "an unreasonable application of" provisions of section 2254(d)(1). *Bell*, 122 S. Ct. at 1849-50. A state court decision can be contrary to this Court's "clearly established" precedent in two ways: (1) if the state court applies a rule that contradicts the governing law set forth in this Court's jurisprudence; or (2) if the state court confronts facts materially indistinguishable from a relevant precedent of this Court and arrives at a result opposite to the one this Court reached. *Williams*, 529 U.S. at 405-06. A state court decision can involve an "unreasonable application" of this Court's precedent in two ways: (1) if the state court identifies the correct governing legal rule from this Court's jurisprudence but

unreasonably applies it to the facts of a particular case; or (2) if the state court either unreasonably extends a legal principle from this Court's jurisprudence to a new context where it should not apply, or unreasonably refuses to extend the principle to a new context where it should apply. *Williams*, 529 U.S. at 407.

The Ninth Circuit found the instant case both "contrary to" clearly established law and an "unreasonable application" of the correct law. Appendix H at 89-101. Germane to the first portion of its analysis, the Ninth Circuit erroneously found the State courts' decisions "contrary" to this Court's established precedent by reasoning the State courts applied the wrong legal standard for purposes of determining the existence of a prima facie showing. Appendix H at 89-91. However, for a state court decision to be "contrary" to this Court's established law, it must be substantially different from the relevant precedent of this Court. *Williams*, 529 U.S. at 405. That is, a state court decision is contrary to this Court's clearly established precedent if it "applies a rule that contradicts the governing law set forth in [this Court's] cases." *Ibid.* In both *Williams* and *Bell*, this Court referenced the word "contrary" in terms of its dictionary meaning, "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Bell*, 122 S. Ct. at 1852; *Williams*, 529 U.S. at 405. Contrary to the Ninth Circuit's analysis, the State court decisions here did not apply rules contradicting the governing law by this Court.

Arriving at the conclusion that the State courts applied contrary law to this Court's established precedent, the Ninth Circuit not only ignored this Court's refusal to formulate procedures for purposes of contesting peremptory challenges (*Batson*, 476 U.S. at 99) but also ignored the previously mentioned lineage of California Supreme Court authority pre-dating *Batson* but which is consistent with *Batson*. Instead, the Ninth Circuit created a mantra which state courts must evoke in deciding whether a moving party failed to establish the initial requisite prima facie showing. That is, according to the Ninth Circuit's analysis, any court's determination which fails to invoke the magic words "an inference of discrimination" or

which invoke either "*Wheeler*" or the phrase a "strong likelihood" will be contrary to established law by this Court. Appendix H at 89-91. Enigmatically, this Court's established law – *Batson* – referenced as an example of existing acceptable state law the very decision to which the Ninth Circuit finds it contrary, i.e., *Wheeler*. The Ninth Circuit's fallacious logic requires redress by this Court.

The Ninth Circuit ***inferred*** the State trial court did not apply the correct legal standard for determining the existence of a prima facie case under *Batson* because the trial court did not articulate its specific reliance upon *Batson*. Appendix H at 90-91. Then the Ninth Circuit found the state appellate court also applied an incorrect legal standard on appellate review because the state court of appeal only referred to language from *Wheeler* when upholding the trial court's findings – the state appellate court found Fernandez failed to show a "strong likelihood" of discrimination – and did not articulate it applied *Batson's* standard of requiring an "inference" of purposeful discrimination. Appendix H at 91. Based upon this justification, the Ninth Circuit then reviewed the facts of the record developed in the trial court de novo rather than with deference as mandated by 28 U.S.C. section 2254(d)(1). However, the Ninth Circuit failed to recognize or acknowledge the fact the state appellate court expressly relied on and referred to *Batson*. Appendix C at 26-27. The Ninth Circuit's reasoning for finding the State trial and appellate courts did not apply the correct legal standard is dangerously erroneous in several respects.

First, under the AEDPA the Ninth Circuit erroneously inferred the State trial court employed the wrong legal standard for determining whether a prima facie showing had been made simply because the State trial court failed to quote this Court's holding in *Batson*. Second, the Ninth Circuit erroneously found the state appellate court applied the wrong legal standard simply because it used language from *Wheeler* and not from *Batson*.

The Ninth Circuit's foundational premise is flawed. Considering the fact California's highest court has not wavered

in acknowledging *Batson* as the authority governing the determination of contested peremptory challenges, and specifically the determination of a prima facie showing of discriminatory jury selection, there should be no question that under AEDPA, the state trial court determinations were in accordance with this Court's established law.[3/] Even if the state court's articulation of the standard differed from that articulated by this Court in *Batson*, it was not diametrically different nor contrary to it in character or nature. *Bell*, 122 S. Ct. at 1852. Ignoring the concept of stare decisis and exalting form over substance, the Ninth Circuit created a mantra without support in either the law or logic; unless this Court intervenes by granting certiorari, trial courts must invoke this mantra at the risk of having their decisions challenged without the benefit of deference.

The Ninth Circuit followed a tortured path of logic to arrive at its conclusion that the standard of establishing a prima facie case of discriminatory jury selection in *Wheeler* was incorrect in light of this Court's holding in *Batson* because the Ninth Circuit ignored the concepts of judicial precedent and stare decisis. The Ninth Circuit reasoned this Court's use of the phrase "raise an inference" to describe the moving party's burden for purposes of establishing a prima facie showing differed from the phrase "strong likelihood" used by the California Supreme Court in *Wheeler* to describe the same burden. *Wade v. Terhune*, 202 F.3d 1190, 1195-97 (9th Cir.

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3. Therefore, the State courts' determinations challenged in federal court should have been accorded the deference required by 28 U.S.C. section 2254 (d)(1). Unfettered by deference, the Ninth Circuit considered the cold record to make factual determinations without the obvious benefits possessed by the trial court – the ability to perceive not just the spoken but also the unspoken responses during voir dire of all parties involved.

2000).[4] The Ninth Circuit's sole basis for this conclusion was the fact this Court did not use the phrase "strong likelihood" in *Batson*. Even though the Ninth Circuit acknowledged the fact that the *Wheeler* decision used both phrases – "reasonable inference" and "strong likelihood" – interchangeably and, in fact, these phrases were equivalent under established California law for numerous years, the Ninth Circuit fallaciously reasoned a state appellate district court decision decided in 1994 – *People v. Bernard*, 27 Cal. App. 4th 458, 32 Cal. Rptr. 2d 486 (1994) – changed 16 years of precedent by finding these two phrases connoted different standards. *Wade*, 202 F.3d at 1196. The Ninth Circuit's reasoning turned the concept of stare decisis upside-down because the California Supreme Court never adopted the reasoning in *Bernard* or cited it for this proposition. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455, 369 P.2d 937, 20 Cal. Rptr. 321 (1962). Rather, the California Supreme Court continued to cite this Court's holding in *Batson* as providing the standard for establishing a prima facie showing.[5] See *Crittenden*, 9 Cal. 4th at 115.

Shortly following the Ninth Circuit's decision in *Wade*, the California Supreme Court expressly disapproved of the language in the *Bernard* decision upon which *Wade* relied. *Box*, 23 Cal. 4th at 1188 n.7. Undaunted by the California Supreme Court's refutation of the reasoning in *Wade*, the Ninth Circuit

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4. Even though the *Wade* court employed a tortured logic to arrive as its conclusion, it ultimately held the State trial court did not commit error under *Batson* after the *Wade* court conducted a de novo review of the facts developed in the trial court. *Wade*, 202 F.3d at 1198-99.

5. "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California." *Auto Equity Sales, Inc.*, 57 Cal. 2d at 455.

made yet another wrong turn down its tortured path of logic, again ignoring stare decisis, by continuing to find an unreasonable application of *Batson*, any time a court referred to or used the "strong likelihood" language found in *Wheeler*. *Copperwood v. Cambra*, 245 F.3d 1042, 1046-47 (9th Cir. 2001).[6]

The Ninth Circuit's twisted trail of logic leads to the instant case where the trial court did not invoke the offensive "strong likelihood" language when denying Fernandez's objection to the prosecutor's exercise of two peremptory jury challenges. Appendix H at 86-88. Rather, the state appellate court upheld the trial court's decision by relying upon *Wheeler* with reference to the necessity of establishing a "strong likelihood" of a group motivated bias for purposes of the initial requisite prima facie showing. Appendix C at 27-29. This reference to the offensive "strong likelihood" standard by the state appellate court was enough for the Ninth Circuit to jettison deference to the state court's determinations and review the cold record de novo, reversing the state courts' findings. Appendix H at 89-91. That is, the Ninth Circuit inferred the trial court unreasonably applied, or was even contrary to, this Court's established law simply because the trial court referred to *Wheeler* rather than *Batson* (even though the trial court did not invoke the offensive "strong likelihood" language), and imputed the "strong likelihood" language used by the appellate court to the trial court's findings to justify its disregard for the AEDPA standard of review.

In essence, the Ninth Circuit's disregard for stare decisis transformed the *Bernard* decision – a decision by an intermediate state appellate court – into governing California law, despite California Supreme Court authority which both implicitly and expressly rejected the reasoning in *Bernard* prior

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6. Again, however, the Ninth Circuit upheld the State trial court's findings after conducting de novo review of the trial court record as it had in *Wade*. *Copperwood*, 245 F.3d at 1047-48.

to this Court's decision in *Batson*. This legal metamorphosis defies logic, defies the established underpinnings of stare decisis and creates a deadly trap for the unwary court which fails to invoke the Ninth Circuit's mantra.

As this Court in *Batson* acknowledged, trial courts are in the best position to make the determinations which the Ninth Circuit now routinely makes based upon a cold record. *Batson*, 476 U.S. at 98 (including footnote 21). Trial courts are present to observe mannerisms, demeanor, tone of voice and a myriad of other factors which legitimately play into the consideration of the exercise of a peremptory challenge. However, the consequences of reviewing these decisions de novo, without the benefits of being an actual observer of those peremptory challenges, can be drastic – per se reversal of a conviction. Given the gravity of the issue involved, the lack of foundation or reasoning for the Circuit Court's holding and the precarious position in which state courts are currently placed on review in federal court, the writ of certiorari should issue.

II.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FAILED TO CONDUCT REVIEW PURSUANT TO THE AEDPA, AND ESTABLISHED AUTHORITY BY THIS COURT APPLYING THE AEDPA, WHEN FINDING THE STATE COURTS' DECISIONS APPLYING *BATSON* WERE UNREASONABLE APPLICATIONS OF THIS COURT'S ESTABLISHED LAW BASED SOLEY UPON A PROPORTIONALITY ANALYSIS

Because the Ninth Circuit reasoned the State court decisions applied incorrect law, it considered the State trial court record of the jury selection process de novo and found the State court decisions were an unreasonable application of *Batson*. Applying primarily Ninth Circuit authority, it found Fernandez established a prima facie showing of discriminatory jury selection as required under this Court's decision in *Batson*, and rejected the State courts' contrary determinations. To arrive at this conclusion, the Ninth Circuit relied solely upon a proportionality analysis of statistics it gleaned from the record and rejected the trial court's ruling that a prima facie showing of discriminatory jury selection had not been made. The Ninth Circuit erred by not conducting its analysis in accordance with this Court's decisions applying the AEDPA and by applying Ninth Circuit authority to the State court's determinations even though the authority which it applied is not established precedent by this Court. The State court decisions in the instant case did not involve an unreasonable application of this Court's established law.

The Ninth Circuit's opinion in the instant case, and its predecessors leading up to it, summarily mention the AEDPA, only to dismiss the deference which the federal courts are to

give state court decisions on review. The Ninth Circuit's decision does not engage in any analysis for dismissing this important aspect of the AEDPA. The Ninth Circuit's decision fails to articulate the actual application of any standard of review other than de novo, despite the fact the instant case (and *Copperwood*, upon which it relied) had the benefit of this Court's April 2000 decision in *Williams*.[7] *Williams*, 529 U.S. at 362. The Ninth Circuit's decision contains no AEDPA analysis. Free from the constraints of the AEDPA, the Ninth Circuit applied its own law which relies upon proportionality and statistical analysis to arrive at its conclusions, but this is not established precedent by this Court and ignores deference to state court factual findings under the AEDPA.

Even though this Court in *Williams* addressed the application of the AEDPA language precluding a federal court from reversing a state court conviction unless it was "contrary to, or involved an unreasoning application of, clearly established Federal law" as determined by this Court, the instant case neither cites to *Williams* nor pretends to apply the principles this Court articulated in *Williams*. Rather, the Ninth Circuit simply references other Ninth Circuit cases along with decisions by this Court addressing peremptory challenges, i.e., *Batson*, 476 U.S. at 79, and its progeny. *Copperwood*, 245 F.3d at 1045-48; Appendix H. Proper analysis in accordance with this Court's decisions applying the AEDPA establishes the devastating effect this error created in the instant case.

As previously established but not recognized by the Ninth Circuit, a state court decision can involve an "unreasonable application" of this Court's precedent in two ways: (1) if the state court identifies the correct governing legal rule from this Court's jurisprudence but unreasonably applies it to the facts of a particular case; or (2) if the state court either unreasonably extends a legal principle from this Court's jurisprudence to a

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7. The Ninth Circuit issued *Copperwood* on April 4, 2001, a year after this Court issued *Williams*. *Copperwood*, 245 F.3d at 1042.

new context where it should not apply, or unreasonably refuses to extend the principle to a new context where it should apply. *Williams*, 529 U.S. at 407. The instant case involves the first analysis – the correct governing legal rule purportedly unreasonably applied by the State courts.

Although the term "unreasonable" is difficult to define, in light of the fact that Congress specifically used that word and not a word such as "erroneous" or "incorrect", an unreasonable application of federal law is different from an incorrect application of federal law. *Williams*, at 410-11. Therefore, a federal court may not issue a writ of habeas corpus challenging a State court decision simply because the federal court concludes in its independent judgment that the State court decision applied clearly established federal law erroneously or incorrectly. Before a federal court can grant habeas corpus relief on the basis the State court decision involved an "unreasonable application" of this Court's established law, the petitioner must establish and the federal court find that the State court decision was "objectively unreasonable." *Williams*, 529 U.S. at 409, 411. However, in the instant case the Ninth Circuit failed to acknowledge or addresses this concept.

In the instant case, the Ninth Circuit found the State "applied an incorrect legal standard." Appendix H at 91. The Ninth Circuit then simply engaged in a *Batson* analysis as though considering the issue for the first time. Appendix H at 92-101. However, when this Court conducted a similar analysis involving *Strickland*,[8] it held more was required. *Bell*, 122 S. Ct. at 1852. This Court in *Bell* specifically rejected the analysis in which the Ninth Circuit engaged in the instant case, stating:

> For respondent to succeed, however, he must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under 2254(d)(1), it is not enough to convince a federal habeas court that, in its

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8. *Strickland v. Washington,* 466 U.S. 668 (1984).

> independent judgment, the state-court decision applied *Strickland* incorrectly.

Bell, 122 S. Ct. at 1852. This Court found AEDPA review required determining that the legal standard applied by the State court was objectively unreasonable. *Ibid.*

Additionally, just as this Court acknowledged in *Bell* the *Strickland* standard for reviewing claims of ineffective assistance of counsel, the standard of review in the instant case accords deference to the trial court's findings, independent from the deference accorded pursuant to 2254(d)(1). *Bell*, 122 S. Ct. at 1852. This Court recognized in *Batson*, the trial court's determinations necessarily turn on an evaluation of credibility so reviewing courts ordinarily should give those state trial court findings great deference. *Batson*, 476 U.S. at 98 n.21. Instead, the Ninth Circuit gave no deference to the state court determinations in the instant case. Therefore, the Ninth Circuit's decision in the instant case contradicts the law as established by this Court for purposes of federal review of a state court decision pursuant to the AEDPA.

The State trial court's and state appellate court's determinations in the instant case were not objectively unreasonable, in light of this Court's decision in *Batson* and its progeny. As the state appellate court noted, each potential juror (venire member) filled out a 21 page questionnaire prior to voir dire commencing. Appendix C at 26. Based solely on the information contained in those questionnaires, which did not include the race of individual, the prosecutor assigned a score to each venire member's questionnaire which related to whether they were acceptable potential jurors to the prosecution. Appendix A at 5-9; Appendix B at 16-17; Appendix C at 26. After the prosecutor's exercise of a peremptory challenge excusing a fourth Hispanic venire member, defense counsel made a "*Wheeler*" motion. Appendix A at 3. The sole basis for counsel's motion was the fact that of 14 peremptory challenges, the prosecutor used 4 of them to excuse Hispanic appearing individuals. Appendix A at 3-4. However, the trial court

questioned whether one of these 4 individuals was in fact Hispanic. Appendix A at 4. The prosecutor then explained his scoring system, and the court found the defense failed to establish a prima facie showing the prosecutor had exercised his peremptory challenges in a discriminatory fashion, especially considering the fact a Hispanic person remained on the venire. Appendix A at 5-10. At no time did defense counsel offer any statistical proportionality analysis regarding the percentages of jurors excused who were Hispanic in comparison to either the total number of jurors or the percentage of Hispanic jurors excused by the prosecutor. Therefore, neither the State trial court considered numerical percentages a factor when it denied the motion nor did the state appellate court consider numerical statistics when affirming the trial court's decision.

While selecting an alternate, the defense made a second "*Wheeler*" motion. Appendix B at 15. This time, the prosecutor excused an African-American venire person. Only two African-Americans had been on the venire, and the prosecutor excused both of them during the course of choosing the jury. Appendix B at 15. This time, defense counsel noted the prosecutor used 6 peremptory challenges out of 20 to excuse "people of color." Appendix B at 16. Again, the prosecutor explained his process of scoring questionnaires and indicated the juror whom he just excused not only received a low score but also appeared totally disinterested in the proceedings. Appendix B at 17-18. The trial court found no prima facie showing of a systematic exclusion based on the discharge of two African-Americans. Appendix B at 18-19.

The state appellate court addressed the factors which can comprise a prima facie showing to establish the exercise of peremptory challenges on the basis of group bias, quoting *Wheeler*, 22 Cal. 3d at 280-81. Appendix C at 27-29. The state appellate court gave deference to the trial court's findings, noting the prosecutor indicated his reasons were based upon the jury questionnaires and the court presiding over the proceedings could determine from the circumstances whether it appeared the prosecutor had challenged jurors on the basis of group bias.

Appendix C at 30. So too did the federal district court of appeal. Appendix D at 56. The federal district court rejected Fernandez's claim. Appendix D at 51-59.

Worthy of note, the federal district court found the statistical sampling in the instant case – 60 venire panel members of which only 7 were Hispanic and 2 African-American – indicated "the prosecutor did not exercise his challengers in a discriminatory manner." Appendix D at 57. That court reached its conclusion based upon much of the same authority which the Ninth Circuit used to reach an opposite conclusion. Appendix D at 55-58; Appendix H at 92-101. Nonetheless, none of the authority referenced in intermediate federal court decisions concerning percentages and proportionality arise from established precedent of this Court.

This Court in *Batson* held the burden is on the moving party to establish the existence of purposeful discrimination by the opposing party during the jury selection process. *Batson*, 476 U.S. at 93. The moving party carries the ultimate burden of persuasion. *Id.* at 94 n.18. This Court gave two nonexhaustive examples of how the moving party could establish a prima facie showing – a pattern of strikes involving an identifiable class as well as the opposing party's questions and statements "during *voir dire* examination . . . ." *Batson*, 476 U.S. at 96-97 (emphasis in original). This Court also gave the examples of "'total or seriously disproportionate exclusion . . .'" of an identifiable group as "'itself such an "unequal application of the law . . . as to show intentional discrimination,'" [citation omitted], as well as "[p]roof of systematic exclusion from the venire . . . ." *Batson*, 476 U.S. at 93-94. However, this Court expressly declined an "attempt to instruct [state and federal trial courts] how best to implement [its] holding . . . ." *Id.* at 99-100 n.24.

Batson sets forth four principles of law concerning a prima facie showing of discriminatory jury selection: 1) the moving party carries the burden of establishing the exercise of peremptory challenges on the basis of group bias; 2) the moving party can make its showing on the basis of several

considerations; 3) deference is accorded to the findings of the trial court; 4) this Court has left implementation of its decision to state and federal courts – there is no specific formula for trial courts or courts of review to follow but rather only a process.

Yet the decision by the Ninth Circuit in the instant case does exactly what this Court declined to do – instruct state courts how to implement this Court's decision in *Batson* and *Batson's* progeny through the use of a formula. The decision in the instant case employs a statistical analysis based upon a comparison of the proportion of venirepersons from an identifiable group (or groups), the total number of persons in the venire, the total number of peremptories exercised by the challenged party and the number of those challenges which were against an identifiable group or groups. Appendix H at 95-98. And the Ninth Circuit conducted this analysis exclusive of the factors which the trial court observed during the jury selection process, including the fact that the court questioned the ethnicity of one of the Hispanic-appearing venirepersons and the prosecutor's indication one of the venirepersons appeared disinterested throughout the jury selection process. Any court reviewing the cold record could not possibly determine the quantitative value of these facts; yet, the Ninth Circuit in the instant case did just this. Furthermore, the Ninth Circuit conducted its analysis without this Court's authority condoning such analysis. Therefore, the instant case has no basis in this Court's clearly established law and, in fact, conflicts with the principles expressed by this Court.

Even if the state courts applied an erroneous legal standard under *Batson*, the Ninth Circuit failed to address whether this was objectively unreasonable for purposes of review under the AEDPA. *Williams*, 529 U.S. at 409, 411, *Bell*, 122 S. Ct. at 1852. The Ninth Circuit's disregard for this Court's decision in *Williams* and resultant improper consideration of the AEDPA "unreasonable application" standard necessitates review by this Court to stop further haphazard federal review of state court decisions involving jury selection. The Ninth Circuit conducted de novo review of the cold record and reversed the state court's

decision based upon case law other than that which is clearly established by this Court. Such review defies the AEDPA as applied by this Court.

The disparate effect of the instant case is unquestionable. A perfectly tried case when improperly reviewed in federal court regarding the denial of a motion contesting an exercise of a peremptory challenge can result in reversal. The instant case exemplifies this because no authority by this Court supports the Ninth Circuit's statistical proportionality analysis for reversing the state courts' determinations. Therefore, certiorari should be granted to address the far-reaching impact of the instant case and those upon which it relies.

CONCLUSION

For the foregoing reasons, certiorari should be granted by this Court.

Dated: June 27, 2002

Respectfully submitted,

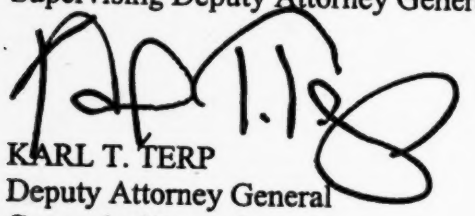
BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON

Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

PETER QUON, JR.
Supervising Deputy Attorney General



KARL T. TERP
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

APPENDIX A

APPENDIX A

[Filed September 9, 1998]

[Pages 69-75]

98-56927

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOAQUIN LESO FERNANDEZ,	) CASE NO. EDCV 97-0272 RT (VAP)
Petitioner,	) REPORTER'S TRANSCRIPT OF
v.	) TRIAL PROCEEDINGS DURING JURY
ERNIE ROE, Warden; et al.,	) SELECTION PROCESS
Respondents.	)

The defense would like to thank and excuse Juror No. 4, Mr. Roedel.

THE COURT: Mr. Roedel, you may return to the jury assembly room.

Mr. Salcido is taking that position.

Mr. Rash?

MR. RASH: The People would thank and excuse Juror No. 7, Ms. Koch.

THE COURT: Ms. Koch? Thank you, Ms. Koch.

PROSPECTIVE JUROR KOCH: Thank you.

THE COURT: Is that "Deike" or "Deike"?

PROSPECTIVE JUROR DEIKE: "Deike."

THE COURT: Ms. Deike is taking that seat.

Mr. Valadez?

MR. VALADEZ: Yes.

The defense would like to thank and excuse Juror No. 7, Ms. Deike.

THE COURT: Ms. Deike? Okay. Thank you, Ms. Deike. You may return again to the jury assembly room. Thank you.

Okay. Mr. Hayes is taking that seat.

Mr. Rash?

MR. RASH: The people would thank and excuse Jury No. 4, Mr. Salcido.

THE COURT: Thank you, Mr. Salcido.

Mr. Pleasant is taking that seat.

Mr. Valadez?

MR. VALADEZ: Yes, your Honor. I need to make a motion.

THE COURT: Okay. Ladies and gentlemen, we'll have to take this up outside your presence.

Let me see counsel.

(The following proceedings were held in chambers:)

THE COURT: At this time we're present outside of the courtroom and the jurors.

Mr. Valadez?

MR. VALADEZ: Yes, your Honor. I would make a motion pursuant to PEOPLE VS. WHEELER that the People have shown a systematic exclusion of the majority of the Hispanics that have been called. I believe they've exercised something like fourteen perempts that I've reduced to four of them being Hispanic.

THE COURT: Pardon me?

MR. VALADEZ: Four of them are Hispanic that I can remember: Mr. Merendon, Ms. Morales, Mr. Salcido, Mr. Sanchez.

I believe based upon the questionnaires and the lack of any follow-up questions as to what was provided in the questionnaires, the People, at this point in time, at least based upon the record as it now stands, haven't given any legitimate purpose for their exclusion. So that's the basis of my motion.

THE COURT: All right. How many people who appear to be Hispanic have you excused, Mr. Valadez?

MR. VALADEZ: I'm not sure, your Honor.

I would add another name. I believe it would be Guzman. At least I have that scratched out. No. That was -- that person was dismissed by the Court.

THE COURT: Okay. Well, Mr. Merendon -- I'm not sure. He appeared to be of Latin descent.

MR. VALADEZ: I think if you look at the questionnaire, there is no question he's Hispanic.

THE COURT: I didn't look --

MR. VALADEZ: That's true. You don't have the questionnaire.

THE COURT: I did not see the questionnaire.

Let's see. Okay. We have Antoinette Morales, and she was excused by Mr. Rash. Correct? Did you excuse her?

MR. RASH: I don't pay attention, your Honor. I can show you my scores and what they get.

THE COURT: Now, Mr. Chaidez, she appears to be of Latin origin. You excused her, Mr. Valadez.

MR. VALADEZ: Yes, your Honor, I did.

THE COURT: Mr. Salcido --

MR. RASH: I would note for the court that Erlinda Chaidez scored very high on my questionnaire, and I was going to keep her, so -- she is certainly Hispanic.

THE COURT: Let's see. We still have Margaret Loya. She appears to be Hispanic.

So how many, by your tally, Mr. Valadez, do you believe that Mr. Rash -- how many people who appear to be Hispanic do you believe that Mr. Rash has excused?

MR. VALADEZ: I'm trying to think of what my notes were as to Mr. -- well, I have Morales; I have Salcido; I have Merendon; I have Mr. Sanchez, who is the original Juror No. 11. I have four.

Frankly, the reason I would think the People would be interested in Chaidez, one, I think I offended her when I pointed her out in the voir dire process. She made sure to point out the fact that she was paying attention after I had used her as an example as somebody who wasn't paying attention; and second, the questionnaire points out that her son was a victim of a stabbing. And I'm sure that's why the People have her so high on the list, not for any other --

MR. RASH: You can't have your cake and eat it too. You can't say I'm kicking out four people because they're Hispanic and then sit there and say I'm keeping her because her son was a -- was a victim of a stabbing. The reality is that the race factor doesn't have anything to do with it. Ms. Chaidez scored a six-plus on my jury questionnaire score.

And Ms. Guzman, who was dismissed by this court for cause, if I remember right, scored an eight plus on my questionnaire (indicating), and she certainly has a Hispanic last name. The reality is she's just a better juror.

I don't think I should be penalized because they happen to have Hispanic last names if, in fact, their answers on the questionnaire are those which give me cause to want to know whether I want them on my jury. When they put down answers that give me an indication that they believe that the criminal justice system is somehow unfair or that they would bend over backwards to acquit, I'm going to kick them off the jury. I don't care what nationality they are.

I can tell you this: You can look at Mr. -- I've already kicked him - - Mr. Asher. He is the lowest number of all. He's not Hispanic. I gave him a one.

THE COURT: Ms. Guzman -- refresh my memory. Why did you excuse her, Mr. Valadez?

MR. VALADEZ: She said she was from the Riverside Police Department and said she could not be fair.

THE COURT: Right.

MR. RASH: I disagree. Of course, this is what WHEELER is all about, but I think it's entirely unfair that we automatically -- "we" being the People -- are assumed to kick people off because of their race, where the defense can do that at will. I'm not making a reverse motion here, but I should be able to kick off jurors that show through their answers in their questionnaires that they would not be jurors that the People would want sitting on this case, regardless of their last name. And I would be more than happy -- or what the Court should probably do, if the Court finds that there is a prima facie case of

discrimination on my part, is take a look at those questionnaires and read them and tell me what you would do.

THE COURT: I would have to say that it does not appear to me that Mr. Rash is intentionally and systematically excluding Hispanic people from the -- from the jury. I understand the point you're making, Mr. Valadez, that he's now excused three or four Hispanic people; however, we still have Ms. Loya on the panel.

He's further indicated that another of the other --

MR. RASH: Ms. Chaidez.

THE COURT: -- Hispanics was very high on his list and he had hoped that they would be on the jury. You have excused one --

MR. RASH: Two.

THE COURT: Two?

MR. RASH: I believe Mr. Valadez has excused two Hispanics.

THE COURT: Other than Ms. Chaidez?

MR. RASH: I thought we had another one. Maybe I'm wrong. Maybe not. I don't know.

THE COURT: Okay. But it does not appear to me that Mr. Rash is systematically seeking to exclude a cognizable group of individuals, i.e., Hispanic people, from the jury. However, if there are any further Hispanics excused from the jury, that would cause me to conclude that a prima facie showing has been made. I just don't see it at this point in time. But if any further Hispanics are excused, we'll have to revisit the issue.

MR. RASH: Okay. I understand that, but that's like holding a gun to the prosecutor's head and saying, "You can't kick off any more Hispanics."

THE COURT: As a practical matter, if you kick any more off, Mr. Valadez is going to make another WHEELER motion. That's the reality of the situation. So we would have to revisit it.

MR. RASH: I understand.

Does the court at any time want me to -- I know you haven't found a prima facie case. Does the court want to go ahead and take those jury questionnaires in as exhibits, or do you think this is enough? Because I'm not so sure -- I would have to do some research on the law, but I'm wondering if, at the appellate level, even if you don't find a prima facie case, I have to explain why I did what I did.

THE COURT: If we want to enter into a stipulation, we could do so, that those jurors' questionnaires could be made part of the record.

MR. RASH: That's fine with me.

MR. VALADEZ: That's fine.

THE COURT: Okay. So out of the presence of the jury, then, we'll have to identify those questionnaires and make them part of the record --

MR. RASH: Okay.

THE COURT: -- to preserve the issue for appeal.

MR. VALADEZ: That's fine.

MR. RASH: Thank you.

(The following proceedings were resumed in open court within the presence and hearing of the jury:)

THE COURT: All right. Let's continue with the

APPENDIX B

APPENDIX B

[Filed June 22, 2000]

[Pages 107-110]

98-56927

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOAQUIN LESO FERNANDEZ, Petitioner, v. ERNIE ROE, Warden; et al., Respondents.	CASE NO. EDCV 97-0272 RT (VAP) REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS DURING JURY SELECTION PROCESS

MR. RASH: People accept Miss Daniels.

THE COURT: All right.

MR. VALADEZ: Defense accepts Miss Daniels.

THE COURT: All right.

Miss Daniels, would you step forward and take the vacant seat next to Miss Russell up here in the top row?

All right. Miss Carter is the next possible alternate.

Mr. Rash?

MR. RASH: I'm sorry. Miss Carter?

THE COURT: Miss Carter.

MR. RASH: People will thank and excuse Miss Carter.

THE COURT: Thank you, Miss Carter. You may return to the jury assembly room.

All right. Miss Cady is the next potential alternate.

Mr. Valadez.

MR. VALADEZ: I need to make a motion.

THE COURT: Pardon me?

MR. VALADEZ: I need to make a motion.

THE COURT: Make a motion?

MR. VALADEZ: Yes.

THE COURT: Okay. All right.

Ladies and Gentlemen, we'll take the motion outside your presence.

(The proceedings continued outside the presence and hearing of the jury)

THE COURT: All right. We're outside the presence of the jury.

Mr. Valadez.

MR. VALADEZ: Yes, your Honor. I make a motion pursuant to People versus Wheeler. Again, in this matter I think it's pretty obvious to the Court that Miss Carter was a black woman.

THE COURT: She appeared to be an African American.

MR. VALADEZ: And, frankly, we had only two African Americans on this venire we've had a chance to speak with or voir dire, as it were.

The other happened to be a Vivian Pleasant, who was excused yesterday by the People. She was the only black juror. I note counsel asked no questions to either of those jurors directly --

MR. RASH: That's not correct.

MR. VALADEZ: -- regarding anything of substance other than a hypothetical question about what evidence is. Something like that.

It seems to me that when we've only had two blacks as prospective jurors and both were excused by the People, it seems to me there's a prima facie showing that, coupled with the People's twenty peremptories, that was four Hispanics, two black people, it seems to me an awful high percentage of the People's peremptories have been used to exclude people of color, and I think there's a prima facie showing of systematic excusal of people of color by the prosecution.

THE COURT: Mr. Rash, do you wish to say anything?

MR. RASH: Sure. I'd be happy to say something.

I think what's interesting about these motions is that when I go through the questionnaires as a prosecutor and I give them a certain score, I don't know what the race is of the individual that is involved. I certainly -- I guess an argument can be made if they have a Hispanic last name, it might be easier

than not, but Miss Carter is certainly, I don't think, a name that is unique to the African American unit and yet I gave her a four minus on my scale. Obviously, I gave her that score based on the answers she gave in the questionnaire. The -- And I'll be happy to introduce the questionnaire into evidence and the Court can look at it. And I put my scores at the very top right-hand corner.

I think it's absurd to sit there and say that, once again, I am obligated to keep a certain color of a juror on the panel just because of their race. That's just not fair when her scores indicate to me she's not a very good juror, not a prosecution juror.

And, further, if the Court watched her, even if I didn't -- wouldn't have scored her based upon her questionnaire answers, if the Court would have watched her from the bench, she was totally disinterested and not involved in the process at all, with the exception of when Mr. Valadez started citing that race should not be made a factor in this case, she started nodding

her head up and down, which was a blatant manipulation on the defense's part in order to make race a factor in this case.

What do I do?

I get up as a prosecutor and I support Mr. Valadez's conclusions that they should not use race, that they should not use any factors other than the law and the evidence. And that's what I always stick with in my voir dires. I don't want bigoted jurors. I want jurors who will be fair and impartial and base their verdict on the evidence.

Quite frankly, from the answers Miss Carter gave in her questionnaire, without knowing what race she was, when I gave her a score, she did not appear to fall within that category.

THE COURT: The Court is going to rule that in exercising twenty peremptory challenges, Mr. Rash has excused two people that appeared to me to be African Americans from the panel. It does not appear to me that that amounts to the systematic exclusion of African Americans from the panel. So, therefore, I don't think that there has been a prima facie showing

that Mr. Rash was systematically excluding African Americans from the jury.

MR. VALADEZ: Thank you.

APPENDIX C

APPENDIX C

[Filed February 14, 1997]

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE,	) E016744
Plaintiff and Respondent,	) (Super.Ct.No. CR 58322)
v.	) OPINION
JOAQUIN LESO FERNANDEZ,	)
Defendant and Appellant.	)

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge. (Judge of the Municipal Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part; reversed in part.

David L. Tucker, Jr., and Howard C. Cohen under appointments by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Janelle B. Davis, Maxine P. Cutler and Robert B. Shaw, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Joaquin Leso Fernandez guilty of one count of second degree murder (Pen. Code, § 187)[1/] and one count of conspiracy to commit murder (§§ 182/187). The court imposed a sentence of 15 years to life for each offense, but stayed the sentence for conspiracy under section 654.

On appeal, defendant contends: (1) the trial court committed error under *People* v. *Wheeler* (1978) 22 Cal.3d 258 by failing to find the defense had made a prima facie showing of prosecutorial abuse in excluding minority jurors; (2) the trial court erred in failing to instruct the jury that intent to kill was a required element of the crime of conspiracy to commit murder; (3) the evidence was insufficient to sustain a

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1. All further statutory references are to the Penal Code unless otherwise indicated.

conviction for conspiracy to commit murder; and (4) the court improperly excluded evidence of defendant's statement immediately after the crime. In a supplemental brief, defendant contends the trial court erred in instructing the jury with CALJIC No. 3.02 and the instruction on reasonable doubt allowed a finding of guilt based on a lesser degree of proof than is required by due process.

We conclude the court erred in its instructions on conspiracy to commit murder, and we reverse that count.

FACTS

Defendant, a member of Los Asesinos gang, went "cruising" with some friends at the La Sierra area of Riverside in the late night of January 29 and early morning of January 30, 1994. Defendant's car passed a group of members of a rival gang, the Brown Knights. The two groups yelled back and forth and exchanged gang signs.

Defendant made a U-turn and approached the Brown Knights group, who began to run. Defendant stopped his car in the middle of the street with the engine running, and he, Juan "Aztec" Botello, and a third man identified only as "Negro" got out and chased the Brown Knights group. One of the Brown Knights, Tony Salazar, became separated from the group.

Defendant and his companions returned to the car a few minutes later, and they drove off. "Aztec" or "Negro" had blood on his hands, and a companion who had remained in the car gave him a napkin to clean up with. "Aztec" threw a knife into the parking lot of a nearby restaurant. When asked what had happened, "Aztec" said he had stabbed Salazar.

Salazar died from a stab wound to the heart. He had a total of seven knife wounds: three stab wounds to the chest, three defensive wounds on his left forearm, and one slashing wound on his back.

A woman who lived near the scene of the stabbing had been awakened by noises. She looked out and saw a "bunch of kids in just kind of a mass" fighting. A car drove up, and some of the kids got in. A boy who was left behind was saying, "Someone help me." The boy collapsed by a tree. The woman told a police officer she had seen three or four males on top of another person, hitting and kicking him.

DISCUSSION

I. The Record Shows No Wheeler Error

After the prosecutor used peremptory challenges to remove four Hispanic jurors, defense counsel objected, citing *People* v. *Wheeler, supra,* 22 Cal.3d 258. At that time, only one Hispanic juror remained among the twelve in the jury box. The court ruled it did not appear that the prosecutor was systematically excluding Hispanics, but warned that "if there are any further Hispanics excused from the jury, that would cause me to conclude that a prima facie showing has been

made. I just don't see it at this point in time. But if any further Hispanics are excused, we'll have to revisit the issue."

Before voir dire, the jurors had completed detailed 21-page questionnaires. A stipulation was entered that the jurors' questionnaires would be made part of the record. The prosecutor did not challenge the remaining Hispanic juror.

During selection of the three alternate jurors, defense counsel objected to the prosecutor's use of a peremptory challenge to remove Ms. Carter, the only African-American called to be one of the alternates. The prosecutor had previously used a peremptory challenge to remove the only African-American called to be one of the twelve regular jurors. Defense counsel charged the prosecutor was systematically excluding "people of color" from the jury. Defense counsel pointed out that the prosecutor had not asked either of the prospective African-American jurors any questions directly, except for a hypothetical question to Carter about what evidence was.

The prosecutor stated that when he went through the jurors' questionnaires, he assigned them scores without knowing their race, and he had assigned Carter a four minus on the basis of the answers in her questionnaire. He further pointed out that during voir dire, "she was totally disinterested and not involved in the process at all, with the exception of when [defense counsel] started citing that race should not be made a factor in this case, she started nodding her head up and down, which was a blatant manipulation on the defense's part in order to make race a factor in this case."

The court found "that in exercising twenty peremptory challenges, [the prosecutor] has excused two people that appeared to me to be African Americans from the panel. It does not appear to me that that amounts to the systematic exclusion of African Americans from the panel. So, therefore, I don't think that there has been a prima facie showing that [the prosecutor] was systematically excluding African Americans from the jury." Defendant contends this ruling was in error. Abuse of peremptory challenges to remove

prospective jurors because of their race violates both the Federal and state constitutions. (*Batson* v. *Kentucky* (1986) 476 U.S. 79, 89 [90 L.Ed.2d 69, 106 S.Ct. 1712, 1719]; *People* v. *Turner* (1994) 8 Cal.4th 137, 164; *People* v. *Wheeler, supra,* 22 Cal.3d at pp. 269-271.)

"If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court." (*People* v. *Wheeler, supra,* 22 Cal.3d at p. 280.) To make a prima facie case, the party "should make as complete a record of the circumstances as is feasible"; "must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule"; and "must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (*Ibid; People* v. *Turner, supra,* 8 Cal.4th at p. 164.)

A party may make a showing of a such a "strong likelihood" by pointing out "that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic -- their membership in the group -- and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . if [defendant is a member of the excluded group], and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (*People* v. *Wheeler, supra*, 22 Cal.3d 258, 280-281, fn. omitted.)

When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias, the reviewing court must consider the entire record of voir dire. (*People* v. *Crittenden* (1994) 9 Cal.4th 83, 116.) """As with other findings of fact, we examine the record for evidence to support the trial court's ruling. Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm. [Citation.]"' [Citations.]" (*Id.* at pp. 116-117.)

Here, the prosecutor explained that he based his decisions to strike particular jurors on their responses to the juror questionnaires which he had reviewed without even knowing jurors' ethnicity. He also pointed out a race-neutral reason for challenging Carter -- that she had appeared uninterested and uninvolved in the proceedings.

The trial court presided over the voir dire and could determine from the circumstances whether it appeared the prosecutor had challenged jurors on the basis of their group association. We view the trial court's ruling with considerable deference. Here, the record "'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question." (*People* v. *Crittenden, supra,* 9 Cal.4th at p. 117.) Specifically, the prosecutor stated he excused jurors based on their responses in the written questionnaire. Thus, we find no error, and we affirm.

II. The Trial Court Erred in Its Jury Instructions on Conspiracy to Commit Murder

Defendant contends the trial court erred in instructing the jury on the elements of conspiracy to commit murder because the instruction failed to state that intent to kill is a required element of the crime of conspiracy to commit murder. (*People* v. *Swain* (1996) 12 Cal.4th 593, 599-607.) The People concede that the instruction given was erroneous, and the error requires reversal.

III. The Evidence Was Insufficient to Prove Conspiracy to Commit Murder

Without citation of authorities or discussion of the evidence, the People contend that because reversal is required for instructional error, defendant's challenge based on the sufficiency of the evidence is moot. The issue is not moot. "Because double jeopardy principles bar retrial after reversal for insufficient evidence, we must address this claim even though we reverse on other grounds. Although there were inconsistencies in the evidence, we must view the record in a light most favorable to the judgment and presume in support of the verdict the existence of every fact the jury could reasonably deduce from the evidence. (*People* v. *Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738, 16 A.L.R.4th 1255].)" (*People* v. *Brock* (1985) 38 Cal.3d 180, 198.)

In another section of their brief, the People argue that the evidence was sufficient to find defendant liable for conspiracy to commit *assault* because he stopped the car and jumped out

with his companions to pursue the victim. However, the theory that defendant formed the intent to commit murder was raised neither on appeal nor in the trial court. In discussing jury instructions with the trial court, the prosecutor stated, "*[I]t is certainly not our position that [defendant] ever entered into the conspiracy to commit murder.* He is saying he entered into conspiracy to commit assault or battery, so therefore, the natural and probable consequences of entering into that agreement is that it was foreseeable that someone could be killed based upon the facts and circumstances in this case." (Italics added.) The prosecutor further explained, "We're asking [the jury] No. 1, to find that he committed -- engaged in that conspiracy, that the defendant engaged in a conspiracy to committee [*sic*] either a battery, an assault, an assault with force likely to create GBI, or a voluntary manslaughter."

In argument to the jury, the prosecutor stated, "No intent to kill. They did not have to intend to kill. Doesn't matter. It is that they did a dangerous act and they killed him. If he wouldn't have died, we would be right here, assault with great

bodily injury. But he died. That automatically elevated it to murder." He further argued, "There are two types of malice, second-degree murder is express malice, unlawful killing, where you express a desire to kill, where you don't deliberate and you don't premeditate. *That's not what we have here.* [¶] We have the implied malice under the law where it is an unlawful killing with the intentional act that is dangerous to life deliberately performed with knowledge of the danger and conscious disregard for life." (Italics added.)

Based on our own review of the record, we conclude no substantial evidence suggested that defendant had the intent to kill. One of his companions who had remained behind in the car testified no one in the car had discussed weapons, and she did not see any weapons in the car before the attack on the victim. Another girl who had remained in the car testified she had seen no weapons in the car before the attack, and other people in the car seemed surprised when "Aztec" said he had stabbed the victim before they drove away. A third person in the car who had not participated in the attack testified there

had been no discussion of what they were going to do before the group jumped out of the car to chase the victim; rather, it had happened "out of the blue." Finally, a fourth person in the car who had not participated in the attack testified no one had said, "Let's go get him," when they got out of the car.

No evidence in the record would support a finding that defendant, who was not the actual killer, harbored the intent to kill. Thus, his conviction of conspiracy to commit murder must be reversed on the ground of insufficient evidence.

IV. Exclusion of Evidence of Defendant's Statement

At trial, defendant proffered evidence that after he and his companions reentered the car, someone asked what had happened, and when "Aztec" stated he had stabbed the victim, defendant said, "You did what?" Defense counsel argued the statement was relevant to show defendant's state of mind, and the statement also qualified as a spontaneous statement under Evidence Code section 1240. The trial court stated that the prosecutor could introduce the statement in the case-in-chief, but "when he starts asking questions about what the defendant

said or did not say on the night of the alleged crime, then he opens up the door to other statements coming in. Normally, it is impermissible for the defendant to offer in self-serving statements unless the defendant testifies or that door to those statements is opened by the prosecutor. But normally the defendant cannot volunteer or seek to elicit those comments from one of the witnesses." The court further found that the statement was reliable and trustworthy, but the problem was it was the defendant's self-serving statement. Defendant did not take the stand, and the statement was not introduced into evidence.

Defendant's statement was not offered for the truth of the matter asserted, and therefore it was not hearsay. Rather, it was offered for the nonhearsay purpose of showing the defendant's state of mind, i.e., surprise that the victim had been stabbed, to show that defendant had not had the intent to murder the victim. The statement was admissible for such purpose under Evidence Code section 1250, subdivision (a)(1).

(*People* v. *Hill* (1992) 3 Cal.4th 959, 987.) The trial court erred in ruling the statement was inadmissible.

However, the People argue defendant suffered no prejudice from the exclusion of the statement because the prosecutor never argued at trial that defendant intended to kill the victim.[2/] Defense counsel admitted defendant was guilty of aiding and abetting an assault. The prosecutor also argued that defendant was guilty of conspiracy to commit an assault by virtue of his stopping the car he was driving and jumping out with his companions to pursue the victim. Under either theory, he was liable for the natural and probable consequences of the resulting attack, even if he did not intend for any consequences beyond a beating. (*People* v. *Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 21.) Thus, we agree the exclusion of the evidence was harmless error.

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2. The excluded evidence would have been relevant to the issue of defendant's intent to kill as an element of the charge of conspiracy to commit murder. However, we have determined that other error requires reversal of defendant's conviction on that count.

V. CALJIC No. 3.02

The trial court instructed the jury based on CALJIC No. 3.02 as follows: "One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [¶] In order to find the defendant guilty of the crime of murder, as charged in Count 1, you must be satisfied beyond a reasonable doubt that, one, the crime of assault or battery or voluntary manslaughter or assault likely to produce great bodily injury was committed. [¶] Two, the defendant aided and abetted such crimes. [¶] Three, a co-principal in such crime committed the crimes of assault or battery or voluntary manslaughter or assault likely to produce great bodily injury, and four, the crime of murder was a natural and probable consequence of the commission of the crime of assault or battery or voluntary manslaughter or assault likely to produce great bodily injury." The form instruction for CALJIC No. 3.02 has blank spaces where specific crimes are

to be inserted; the underlined portions above were the insertions made by the court.

Defendant contends that in the third section of CALJIC No. 3.02, the court erroneously listed the underlying predicate offenses, i.e., assault, battery, voluntary manslaughter, assault likely to produce great bodily injury, when it should have listed the ultimate offense, i.e., murder. Defendant contends that the instruction, as given, removed from the jury the crucial determination whether in fact a murder had been committed. The trier of fact must determine all the elements of a crime. (*People* v. *Hedgecock* (1990) 51 Cal.3d 395, 409.)

The People concede that the court should have inserted the ultimate crime of murder in the third section of CALJIC No. 3.02. However, the People argue that any error was harmless; the instruction as given required the jurors to find that a murder had been committed.

We agree that any error was harmless. The first paragraph of the instruction states that a defendant is guilty not only of the crime he aids and abets, but also "of any other

crime *committed by a principal* which is a natural and probable consequence of the crime originally aided and abetted." Thus, for the aiding and abetting instruction to apply to murder, the jury would necessarily have had to find that a murder was committed.

VI. The Instruction on Reasonable Doubt Did Not Violate Due Process

The court instructed the jury using the language of the 1994 revision of CALJIC No. 2.90: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." Defendant contends the 1994 revision of CALJIC No. 2.90 unconstitutionally permits a finding of guilt on a lesser showing than that required by the due process clause.

The 1994 revision was suggested by the California Supreme Court in *People* v. *Freeman* (1994) 8 Cal.4th 450, 504, after the phrases "moral certainty" and "moral evidence," which formerly appeared in CALJIC No. 2.90, were criticized by the United States Supreme Court in *Victor* v. *Nebraska* (1994) 511 U.S. 1 [127 L.Ed.2d 583, 114 S.Ct. 1239]. The present version has repeatedly been upheld against constitutional attack. (*People* v. *Elliott* (1996) 47 Cal.App.4th 935; *People* v. *Hurtado* (1996) 47 Cal.App.4th 805; *People* v. *Tran* (1996) 47 Cal.App.4th 253; *People* v. *Carroll* (1996) 47 Cal.App.4th 892; *People* v. *Light* (1996) 44 Cal.App.4th 879; and *People* v. *Torres* (1996) 43 Cal.App.4th 1073.)

Moreover, the United States Supreme Court in *Victor* v. *Nebraska, supra*, explicity noted, that "[a]n instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof." (*Id.* a p. ___ [127 L.Ed.2d at p. 596].) This is just what the court instructed the jury in the present case. There was no error.

DISPOSITION

The conviction of conspiracy to commit murder is reversed. In all other respects the judgment is affirmed.

NOT FOR PUBLICATION

/s/ Ward
J.

We concur:

/s/ Ramirez
P.J.

/s/ McDaniel
J.*

* Retired Associate Justice of the Court of Appeal, Fourth District, sitting under assignment by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX D

APPENDIX D

[Filed July 9, 1998]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOAQUIN LESO FERNANDEZ, Petitioner,	)	CASE NO. EDCV 97-0272 RT (VAP)
v.	)	REPORT AND RECOMMENDATION
ERNIE ROE, WARDEN, et al., Respondents.	)	OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Robert J. Timlin, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I. SUMMARY OF PROCEEDINGS

Petitioner, a state prisoner, filed the instant Petition for Writ of Habeas Corpus on October 8, 1997. Respondents filed a Return on December 17, 1997. Petitioner filed a Traverse on June 12, 1998. For the following reasons, the Magistrate Judge recommends the Petition be denied with prejudice.

II. BACKGROUND

Petitioner was a member of "Los Asesinos," a street gang in Corona, California. [Reporter's Transcript ("R.T.") 286, 493-94.] The victim, Tony Salazar, was a member of a rival gang. [R.T. 218, 334-35.]

On January 29, 1994, Petitioner was driving his vehicle, a Buick Regal, in the La Sierra neighborhood in Riverside. [R.T. 274-77, 346-47, 368-69, 498-99.] With him in the vehicle were Rudy Cardenas (a.k.a. "Chico"), Mario Raya (a.k.a. "Mugsy"), Juan Botello (a.k.a. "Aztec"), Alexandria Salazar, Sandra Arellano, and a person known either as "Puppet" or "Negro." [R.T. 282-84, 370-72, 499, 610.]

Petitioner's car passed Salazar and a group of his associates, and the two groups exchanged hostile words and gang hand signs. [R.T. 239-48, 284-85, 373-77, 502-03.] Petitioner's car passed Salazar's group a second time and then made a u-turn back toward the group. [R.T. 247-51, 292-93, 379-81, 504-05.] Salazar's group ran away, and Salazar became separated from his friends. [R.T. 211, 251-54, 293, 380.] Petitioner stopped his car in the middle of the street with the engine running. [R.T. 293-94, 381-82, 418.] Petitioner, Cardenas, Raya, Botello and Puppet got out of the car and chased the Salazar group. [R.T. 294-95, 381-82, 506-08.]

Petitioner and his four friends returned to Petitioner's vehicle a few minutes later. [R.T. 295-97, 385-86, 508-09.] Botello had blood on him, and Alexandria Salazar gave him a napkin to wipe his hands. [R.T. 297, 386-87.] She asked Botello what had happened, and Botello responded that he had stabbed Tony Salazar. [R.T. 399, 410, 413-14.] Botello later

threw a knife into a nearby parking lot. [R.T. 297-98, 303, 388.]

The stabbing was witnessed by Mary Shaver, who lived near the scene. [R.T. 73.] She testified she was awakened at about 2:00 a.m. by noises, and saw a group of kids outside. [R.T. 75-76.] She told police she saw three or four males on top of another person, hitting and kicking the victim. [R.T. 77-78, 433-34.] Some of them got into a car, leaving behind one boy, who cried, "Someone help me." [R.T. 76-78, 434.]

Salazar suffered three stab wounds in his chest, three cut wounds on his arm and one slashing wound in his back. [R.T. 449-50.] He died from a stab wound to the heart. [R.T. 451, 473.]

A jury convicted Petitioner of one count of second degree murder, and one count of conspiracy to commit murder. [R.T. 762-63.] The trial court sentenced Petitioner to fifteen years to life in state prison. [R.T. 786-87.] On February 14, 1997, the California Court of Appeal issued an opinion reversing Petitioner's conviction for conspiracy to commit murder, and

affirming the judgment in all other respects. [Lodged Document no. 9 at 15.] The California Supreme Court denied Petitioner's two subsequent habeas corpus petitions on May 28, 1997. [Lodged Documents no. 13 & 15.]

III. PETITIONER'S CONTENTIONS

Liberally construing the Petition, Petitioner challenges his conviction and alleges the following grounds for habeas relief:

1. The trial court erred in denying Petitioner's Wheeler motion challenging the prosecutor's exercise of peremptory challenges. [Exhibit in Support of Petition at 13-19.]
2. The trial court erred in failing to instruct the jury that intent to kill was a required element of the charge of conspiracy to commit murder. [Petition at 7; Exhibit in Support of Petition at 20-23.]
3. There was insufficient evidence to support Petitioner's conviction for conspiracy to commit murder. [Petition at 7; Exhibit in Support of Petition at 24-26.]

4. The trial court improperly excluded evidence of a statement made by Petitioner to one of the witnesses immediately after the crime. [Petition at 7; Exhibit in Support of Petition at 27-28.]

5. The trial court erred in instructing the jury with California Jury Instructions - Criminal ("CALJIC") 3.02. [Appellate Opinion attached as Exhibit to Petition at 2, 12-14.]

6. The trial court erred in instructing the jury on reasonable doubt. [Appellate Opinion attached as Exhibit to Petition at 2, 14-15.]

As discussed above, the California Court of Appeal reversed Petitioner's conviction for conspiracy to commit murder. Therefore, the Petition is moot as to grounds (2) and (3).

IV. DISCUSSION

A. STANDARD OF REVIEW

The Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court applies the AEDPA in reviewing the Petition. See Lindh v. Murphy, 117 S. Ct. 2059, 2068 (1997); Woratzeck v. Stewart, 118 F.3d 648, 650 (9th Cir. 1997). The AEDPA provides that a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d) (1997).

Under the AEDPA, the Court continues to examine state court conclusions of federal law de novo. Jeffries v. Wood, 114 F.3d 1484, 1500 (9th Cir.) (en banc), cert. denied, 118 S. Ct. 586 (1997); Drinkard v. Johnson, 97 F.3d 751, 768 (5th Cir. 1996), cert denied, 117 S. Ct. 1114 (1997); Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev'd on other grounds, 117 S. Ct. 2059 (1997). Questions of federal law are reviewed to determine whether the state court decision is contrary to "an authoritative decision of the Supreme Court." Moore v. Calderon, 108 F.3d 261, 264 (9th Cir.), cert. denied, 117 S. Ct. 2497 (1997); Lindh v. Murphy, 96 F.3d at 869. State court determinations of mixed questions of law and fact are reviewed for "reasonableness." See Moore v. Calderon, 108 F.3d at 265 n.3; Lindh v. Murphy, 96 F.3d at 870-71. A federal court must determine whether the state ruling on a mixed question of law and fact involved an unreasonable application of clearly established federal law. See Drinkard v. Johnson, 97 F.3d at 767-769; Lindh v. Murphy, 96 F.3d at 870-71. The Court accords "great

deference" to a state court's factual findings, which are presumed to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Jeffries v. Wood, 114 F.3d at 1499-1500; Drinkard v. Johnson, 97 F.3d at 767.

As discussed below, Petitioner does not satisfy the AEDPA's standard for a grant of the writ; thus, the Petition should be denied.

B. THE WHEELER MOTION

In ground 1 of the Petition, Petitioner claims the trial court erred when it denied the motion made on his behalf pursuant to People v. Wheeler, 22 Cal. 3d 258 (1978), challenging the prosecutor's exercise of peremptory challenges. In California, a Wheeler motion is the procedural equivalent of a federal motion pursuant to Batson v. Kentucky, 476 U.S. 79 (1986) ("Batson"). See People v. Jackson, 10 Cal. App. 4th 13, 21 n.5 (1992).

Under Batson, a "'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the

administration of justice violates the Equal Protection Clause.'" Batson, 476 U.S. at 84 (citing Swain v. Alabama, 380 U.S. 202, 203-04 (1965), overruled on other grounds, Batson, 476 U.S. at 93)). Thus, Petitioner argues the adverse ruling on his Wheeler motion resulted in a violation of the equal protection clause under the Fourteenth Amendment to the United States Constitution.

During selection of the petit jury, the prosecutor exercised a total of twenty peremptory challenges,[1/] four of which were directed at Latino venire members. [Augmented Reporter's Transcript ("Aug. R.T.") 70-72.] The defense exercised one peremptory challenge to remove a Latino panel member, and the trial court also excused a Latino panel member for cause. [Aug. R.T. 71-72.] One Latina woman was selected to serve on the jury. [Aug. R.T. 71; R.T. 764.]

The prosecutor explained that before voir dire commenced, he assigned scores to juror questionnaires

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1. [Aug. R.T. 30, 32-34, 49-52, 68-69, 76-77, 104.] The prosecutor exercised two additional strikes in selecting the alternate jurors. [Aug. R.T. 107, 111.]

completed by the prospective jurors, and used these scores to determine which venire members to excuse. [Aug. R.T. 71-73, 109.] He stated that he did not know the race of the venire members at the time he reviewed the questionnaires. [Aug. R.T. 109.] The prosecutor assigned lower scores to those members whose answers indicated that they believed the criminal justice system was unfair or that they would acquit the defendant. [Aug. R.T. 72-73.]

The trial court, in considering Petitioner's Wheeler motion, found that it did not appear that the prosecutor was intentionally excluding Latinos from the jury. [Aug. R.T. 73-74.] The court, however, cautioned that it would find a prima facie showing of discrimination if the prosecution sought to excuse another Latino venire member. [Aug. R.T. 74.]

During the selection of the alternate jurors, Petitioner's attorney made a second Wheeler motion when the prosecution exercised a peremptory challenge to excuse an African American panel member. [Aug. R.T. 108.] Petitioner's attorney noted that the only other African American on the

panel had been excused by the prosecution the day before. [Aug. R.T. 108.] The prosecutor explained that he had assigned a low number to the questionnaire completed by the second African American venire member. [Aug. R.T. 109.] The prosecutor further noted that the second African American appeared to be uninterested in the process, except when she nodded her head up and down when the defense attorney stated that race should not be a factor in the case. [Aug. R.T. 109-10.] The trial court found that the prosecution had not systematically excluded African Americans from the panel, and thus the defense had not established a prima facie case of discrimination. [Aug. R.T. 110.]

In Batson, the Supreme Court "outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause . . . . First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to

articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (plurality opinion) (citations omitted); Batson, 476 U.S. at 96-98.

To establish a prima facie case under the first step of the Batson analysis, Petitioner must show that the prosecution exercised a peremptory challenge against a member of a constitutionally protected class, and the circumstances surrounding the strike created an inference of purposeful discrimination. Johnson v. Campbell, 92 F.3d 951, 953 (9th Cir. 1996); United States v. Ponce, 51 F.3d 820, 830 (9th Cir. 1995). The Court accords "great deference to a trial court's determination regarding the establishment of a prima facie case because of the trial court's unique awareness of the totality of the circumstances, the factual nature of the determination, and the judge's ability to observe all of the parties." Johnson v. Campbell, 92 F.3d at 953; see also

Senegal v.White, 881 F. Supp. 1421, 1426 (N.D. Cal. 1995), aff'd, 89 F.3d 846 (9th Cir. 1996) (a state trial court's finding that a prima facie case had not been established is a determination of fact entitled to deference on federal habeas review); but see Turner v. Marshall, 63 F.3d 807, 814 (9th Cir. 1995) (declining to defer to the state trial court's finding because the record indicated the trial court's Batson analysis was incomplete).

The record shows that out of a total of twenty-two peremptory challenges, the prosecutor used four challenges to exclude four out of the seven Latino venire members, and two challenges to exclude the only African Americans on the panel. The prosecutor's use peremptories in this manner is one factor to consider in determining whether the facts established an inference of discrimination. See Turner v. Marshall, 63 F.3d at 812-13 (comparing the number of class members excused by the prosecutor to the number of class members in the panel as a whole, and finding that the exclusion of five

African Americans out of a total of nine African American venire members raised an inference of discrimination).

On the other hand, the record indicates that a total of approximately sixty panel members were called [Aug. R.T. 4, 34, 52, 80], and out of the sixty, only seven were Latino and two were African American. Thus, the low percentage of minority members on the jury venire is a factor indicating the prosecutor did not exercise his challenges in a discriminatory manner. See Turner v. Marshall, 63 F.3d at 813 (evaluating the percentage of minority group members in the venire).

Furthermore, the prosecutor's explanation that he exercised peremptories on the basis of scores assigned to juror questionnaires supports the conclusion that he did not exercise his peremptory challenges in a discriminatory manner. See United States v. Ponce, 51 F.3d at 830 (holding that the defense failed to establish a prima facie case of discrimination where the prosecutor excluded a venire member on the basis of a prior evaluation of juror questionnaires). The prosecutor also provided a race neutral reason for excusing the second African

American venire member. See Johnson v. Campbell, 92 F.3d at 953-54 (reviewing neutral reasons for the exercise of a peremptory challenge to determine whether a prima facie case was established).

The circumstances as a whole support the trial court's finding that Petitioner failed to establish a prima facie showing of discrimination. The California Court of Appeal also arrived at this conclusion in reviewing Petitioner's Batson claim on direct review. [Lodged Document no. 9 at 6-8.] Petitioner does not show that the Court of Appeal's conclusion was contrary to, or involved an unreasonable application of, clearly established federal law, or that it was based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d). Accordingly, this claim should be denied.

C. EXCLUSION OF PETITIONER'S STATEMENT

In claim 4, Petitioner contends the trial court improperly excluded evidence of a statement made by Petitioner to one of the witnesses immediately after the crime.

State evidentiary rulings are not cognizable in a federal habeas proceeding, unless the exclusion of the evidence violated the petitioner's due process right to a fair trial. Estelle v. McGuire, 502 U.S. 62, 70 (1991); Gordon v. Duran, 895 F.2d 610, 613 (9th Cir. 1990). To establish a due process violation, Petitioner must demonstrate the trial court's ruling was so prejudicial that it rendered his trial fundamentally unfair. See Ortiz-Sandoval v. Gomez, 81 F.3d 891, 897 (9th Cir. 1996); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991).

The record shows that when Botello got back into Petitioner's car after the stabbing and said, "I stabbed him," Petitioner responded, "You did what?" [R.T. 31, 33-34.] In a pretrial motion, the prosecutor moved to exclude testimony by any witness except Petitioner about this statement. [R.T. 28, 34.] Petitioner's attorney argued that the statement was relevant to show Petitioner's intent. [R.T. 31, 37.] The trial court ruled that the statement was self-serving and could not

come in through the testimony of any witness other than Petitioner. (R.T. 37, 39.]

The California Court of Appeal found that the trial court erred in ruling that Petitioner's statement was inadmissible. [Lodged Document no. 9 at 11.] The Court of Appeal, however, found that the error was harmless because Petitioner's intent to kill the victim was not relevant to determining Petitioner's liability for murder under an aiding and abetting theory. [Lodged Document no. 9 at 11-12.]

Assuming arguendo, that the trial court's erroneous ruling amounted to federal constitutional error, the error is subject to harmless error review under the standard announced in Kotteakos v. United States, 328 U.S. 750, 776 (1946). See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Franklin v. Henry, 122 F.3d 1270, 1273 (9th Cir. 1997). The test under Kotteakos is whether, in light of the record as a whole, the error had "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. at 637; Franklin v. Henry, 122 F.3d at 1273.

Petitioner's statement, "You did what?" was relevant because it indicated that Petitioner was surprised by Botello's attack on Salazar, creating an inference that Petitioner did not have the intent to kill Salazar. The prosecutor, however, argued that Petitioner was guilty of second degree murder under an aiding and abetting theory. [R.T. 678-79.] To convict Petitioner on an aiding and abetting theory, the jury had to find that Petitioner: (1) acted with knowledge of the perpetrator's criminal purpose; (2) had the intent to commit, encourage or facilitate the underlying crime; and (3) actually promoted, encouraged or instigated the underlying crime. See People v. Prettyman, 14 Cal. 4th 248, 254 (1996); People v. Croy, 41 Cal. 3d 1, 11-12 (1985).

The prosecutor argued, and Petitioner's attorney admitted, that Petitioner was guilty of aiding and abetting an assault. [R.T. 681-82, 696.] The intent required for aiding and abetting liability is the intent to bring about the underlying criminal conduct, not the intent that is an element of the actual offense committed. People v. Prettyman, 14 Cal. 4th at 261; People v.

Croy, 41 Cal. 3d at 12 n.5. "[A] person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted." People v. Prettyman, 14 Cal. 4th at 254; People v. Croy, 41 Cal. 3d at 12 n.5. Thus, the jury did not have to find that Petitioner had the intent to kill Salazar, but rather that he had the intent to commit, encourage or facilitate the commission of the assault, and that the murder was a natural and probable consequence of the assault.

Evidence that Petitioner lacked the intent to kill Salazar was not relevant to the jury's evaluation of whether Petitioner had the intent to aid Botello in committing the underlying assault. Therefore, the exclusion of Petitioner's statement did not have a substantial or injurious effect on the verdict. Accordingly, this claim should be denied.

D. CALJIC 3.02

In claim 5, Petitioner contends the trial court erred in instructing the jury with CALJIC 3.02. The trial court instructed the jury pursuant to CALJIC 3.02 as follows:

> One who aids and abets [another] in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted.
>
> In order to find the defendant guilty of the crime[s] of murder, [as charged in Count I,] you must be satisfied beyond a reasonable doubt that:
>
> (1) The crime of assault or battery or voluntary manslaughter or assault likely to produce great bodily injury was committed,
>
> (2) The defendant aided and abetted such crime[s],

(3) A co-principal in such crime committed the crime[s] of assault or battery or voluntary manslaughter or assault by means of force likely to produce great bodily injury,

(4) The crime[s] of murder was a natural and probable consequence of the commission of the crime of assault or battery or voluntary manslaughter or assault by means of force likely to produce great bodily injury.

[R.T. 631-32; C.T. 361.]

On direct appeal, the People conceded that in subpart three, the trial court erroneously listed the underlying predicate offenses (i.e., assault, battery, voluntary manslaughter, or assault likely to produce great bodily injury), rather than listing the ultimate offense of murder. [Lodged Document no. 9 at 13.] The California Court of Appeal determined that the error was harmless. [Lodged Document no. 9 at 13-14.]

Assuming the trial court's instructional error amounted to a federal constitutional violation, the misdescription or

omission of an element from an instruction defining an offense is subject to harmless error analysis. California v. Roy, 519 U.S. 2, 117 S. Ct. 337, 339 (1996) (per curiam) (the trial court's failure to instruct on the specific intent required for aiding and abetting liability under California law was subject to harmless error review). In evaluating harmless error, the Court conducts an examination of the findings necessarily made by the jury, as well as an independent examination of the evidence contained in the trial record. Pollard v. White, 119 F.3d 1430, 1433-1434 (9th Cir. 1997); Roy v. Gomez, 108 F.3d 242, 243 (9th Cir.) (en banc), cert. denied, 118 S. Ct. 196 (1997) (adopting the analysis, reasoning and conclusions stated in the dissent to the en banc decision in Roy v. Gomez, 81 F.3d 863 (9th Cir. 1996)); Roy v. Gomez, 81 F.3d 863, 870-71 (9th Cir.) (en banc) (Wallace, J., dissenting).

The first paragraph of CALJIC 3.02 informed the jury that an aider and abettor is "guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided." [R.T. 631-32;

C.T. 361 (emphasis added).] The fourth paragraph also instructed the jury that it had to find that the crime of murder was a natural and probable consequence of the crime aided. Thus, the instruction as a whole informed the jury that it had to find that Botello committed a murder and that murder was a probable consequence of the assault on Salazar.

Furthermore, the evidence presented at trial showed that Botello had blood on him when he returned from the confrontation with Salazar, he admitted he stabbed Salazar, and he threw a knife away shortly thereafter. This evidence, in combination with the evidence of the stab wounds suffered by Salazar, strongly supported a finding that Botello murdered Salazar. Thus, an examination of the instruction and the record as a whole shows that the trial court's misdescription of the ultimate offense committed by Botello did not have a substantial or injurious effect on the jury's verdict. See Pollard v. White, 119 F.3d at 1434 (holding that an error in the definition of first degree murder was harmless because the evidence supported the petitioner's conviction of second

degree murder); Roy v. Gomez, 81 F.3d at 871 (Wallace, J., dissenting) (holding that an error in the omission of an instruction on specific intent was harmless because the evidence in the record supported a finding that the petitioner had the intent to aid and abet a robbery).[2/] Accordingly, this claim should be denied.

E. REASONABLE DOUBT INSTRUCTION

In claim 6, Petitioner contends the trial court erred instructing the jury on reasonable doubt because the instruction permitted finding of guilt based on a lesser degree of proof than is required by due process. This claim is foreclosed by Victor v. Nebraska, 511 U.S. 1, 12-17 (1994) (holding that California's reasonable doubt instruction, CALJIC 2.90, is constitutional).

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2. As noted above, the dissenting opinion in Roy v. Gomez, 81 F.3d 863, subsequently was adopted as the majority opinion. See Roy v. Gomez, 108 F.3d at 243.

V. RECOMMENDATION

For all of the foregoing reasons, the Magistrate Judge recommends the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) and directing that judgment be entered denying the Petition with prejudice.

DATED: July 9, 1998

VIRGINIA A. PHILLIPS
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

APPENDIX E

[Filed September 9, 1998]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOAQUIN LESO FERNANDEZ,	)	CASE NO. EDCV 97-0272 RT (VAP)
Petitioner,	)	
v.	)	JUDGMENT
ERNIE ROE, Warden; et al.,	)	
Respondents.	)	

Pursuant to the Order Approving And Adopting The Report And Recommendation Of The United States Magistrate Judge, And Denying The Petition For Writ Of Habeas Corpus ("Petition"),

IT IS ADJUDGED that the Petition is denied.

DATED: September 9, 1998

ROBERT J. TIMLIN
United States District Judge

APPENDIX F

APPENDIX F

[Filed September 9, 1998]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOAQUIN LESO FERNANDEZ,	) CASE NO. EDCV 97-) 0272 RT (VAP)
Petitioner,	)
v.	) ORDER (1)) APPROVING AND) ADOPTING THE
ERNIE ROE, Warden; et al.,	) REPORT AND) RECOMMENDATION
Respondents.	) OF THE UNITED) STATES MAGISTRATE) JUDGE, AND (2)) DENYING THE) PETITION FOR WRIT) OF HABEAS CORPUS

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition For Writ of Habeas Corpus ("Petition"), Respondents' Return and Petitioner's Traverse, all of the records herein and the Report And Recommendation of the United States Magistrate Judge ("Report"). Further, the Court has engaged

in a de novo review of those portions of the Report to which Petitioner has objected.

IT IS ORDERED that: (1) the Court approves and adopts the Report and Recommendation, (2) the Petition be denied, and (3) Judgment be entered denying the Petition.

DATED: September 9, 1998

ROBERT J. TIMLIN
United States District Judge

APPENDIX G

[Filed March 23, 2000]

UNTIED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOAQUIN LESO FERNANDEZ,	No. 98-56927
Petitioner-Appellant,	DC# CV-97-272-RJT Central California
v.	ORDER
ERNIE ROE, Warden; et al.,	
Respondents-Appellees.	

Before: FARRIS and CANBY, Circuit Judges

The request for a certificate of appealability is granted with respect to the following issue: Did the district court err by denying appellant's claim that the trial court erred when it denied his motion pursuant to *People v. Wheeler,* 22 Cal. 3d 258 (1978), in light of *Wade v. Terhune,* 202 F.3d 1190, 1197 (9th Cir. 2000) (holding that California courts following language of *Wheeler* apply incorrect legal standard for prima

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facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986))? *See* 28 U.S.C. § 2253(c)(3).

Appellant's motion for leave to proceed in forma pauperis is granted. The Clerk shall change the docket to reflect appellant's in forma pauperis status for this appeal.

The opening brief is due May 3, 2000; the answering brief is due June 2, 2000; the optional reply brief is due within 14 days after service of the answering brief.

Because appellant is a prisoner proceeding in forma pauperis and is not represented by counsel, appellant is not required to file excerpts of record. *See* 9th Cir. R. 24-1.

APPENDIX H

[Filed April 8, 2002]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOAQUIN LESO FERNANDEZ,	)	No. 98-56927
	)	
Petitioner-Appellant,	)	D.C. No. CV-97-00272 RT-VAP
	)	
v.	)	
	)	OPINION
ERNIE ROE, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Respondents-Appellees.	)	
	)	

Appeal from the United States District Court
for the Central District of California
Robert J. Timlin, District Judge, Presiding

Argued and Submitted
November 5, 2001–Pasadena, California

Filed April 8, 2002

Before: Myron H. Bright,* Alex Kozinski, and
William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher

SUMMARY

Criminal Law and Procedure/Juries

The court of appeals reversed a judgment of the district court. The court held that a prosecutor's use of his peremptory challenges to strike four out of seven (57%) Hispanics, while Hispanics constituted only 12% of the 60-person venire, but 21% of those stricken (four out of 19), raises an inference of exclusion based on race.

Appellant Joaquin Fernandez was a member of a Latino gang in Corona, California. He was tried in California Superior Court for his alleged role in the killing of a member of another Latino gang. Fernandez's 60-person venire including 19 Hispanics and two African-Americans. Of the potential jurors called for voir dire, seven were Hispanic, and

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*Honorable Myron H. Bright, Senior Circuit Judge for the Eighth Circuit, setting by designation.

two were African-American. In the first round of challenges, without any direct questioning, the prosecutor used his first peremptory against a Hispanic. In the next round, the prosecutor struck two more Hispanics, both without any direct questioning almost immediately after being seated in the jury box. In the third round, again without any questioning, the prosecutor struck a fourth Hispanic. Thereafter, Fernandez objected under *People v. Wheeler,* 22 Cal. 3d 258 (1978), to all the prosecutor's peremptory challenges against the prospective Hispanic jurors. The trial court did not request an explanation from the prosecutor of his challenges, but the prosecutor volunteered that the challenges were based on scores he had assigned to the juror questionnaires, on which their surnames appeared, before voir dire had commenced. Without reviewing any of the juror questionnaires, the trial court denied the *Wheeler* motion, but admonished that if there were any more Hispanics excused from the jury, it would conclude that a

prima facie showing had been made. After this exchange, a Hispanic woman was seated on the jury.

When voir dire continued, the prosecutor struck without any direct questioning the only two prospective African-American jurors. Fernandez brought a second *Wheeler* motion. The trial court concluded that no *prima facie* case of discrimination against African-Americans had been shown and denied the motion. After trial, the jury returned a verdict of guilty for second degree murder and conspiracy to commit murder. The California Court of Appeal reversed the conspiracy conviction but otherwise affirmed. Applying the *Wheeler* standard, it ruled that Fernandez had not shown a "strong likelihood" that the prosecutor had challenged the prospective jurors on account of their race or ethnicity, and therefore had not established a *prima facie* case of discrimination. The court did not apply the standard of *Batson v. Kentucky,* 476 U.S. 79, 96 (1986), which requires only that a criminal defendant show facts and circumstances that "raise an

inference" of exclusion based on race or ethnicity in order to establish a *prima facie* case.

After filing two unsuccessful petitions for habeas corpus in the California state courts, Fernandez petitioned for habeas corpus in federal district court, contending that the prosecutor's use of the challenges violated the Equal Protection Clause. The district court ruled that the trial court did not err in finding that Fernandez had failed to establish a *prima facie* case of discrimination under *Batson,* and denied the petition with prejudice.

Fernandez appealed.

[1] California state courts following *Wheeler* have erroneously required a defendant to show a "strong likelihood" of discrimination in order to establish a *prima facie* case rather than just an "inference" of discrimination as required by *Batson.* The state trial court did not expressly articulate the strong likelihood standard in finding that Fernandez had not established a *prima facie* case, but it treated both motions as *Wheeler,* rather than *Batson,* motions. When the California

Court of Appeal affirmed the trial court's denials of Fernandez's claims, it expressly employed the strong likelihood language of *Wheeler*. The Court of Appeal did not mention *Batson* or its more lenient inference test. Because the California state courts applied an incorrect legal standard, contrary to federal law as pronounced in *Batson*, Fernandez's *Batson* claims had to be reviewed *de novo*.

[2] Under *Batson*, a prosecutor's racially discriminatory use of peremptory challenges violates the Fourteenth Amendment's Equal Protection Clause. To bring a successful *Batson* challenge, a defendant must first establish a *prima facie* case by showing that (1) the defendant is a member of a cognizable group; (2) the prosecution has removed members of such a group; and (3) circumstances raise an inference that the challenges were motivated by race. **[3]** Both Hispanics and African-Americans constitute cognizable groups for *Batson* purposes. A criminal defendant may object to race-based exclusion of jurors whether or not the defendant and the excluded jurors are of the same race. Fernandez, a Hispanic,

thus permissibly could raise a *Batson* challenge based on the exclusion not only of Hispanics, but also of African-Americans, from the jury.

[4] A pattern of exclusionary strikes is not necessary for finding an inference of discrimination. But a pattern of exclusion of minority venirepersons provides support for an inference of discrimination. The Ninth Circuit has found a *prima facie Batson* violation where the prosecution exercised peremptory challenges to exclude five out of a possible nine (56%) African-American jurors. **[5]** The court relied not only on the high proportion of African-Americans stricken, but also on the disproportionate rate of strikes against African-Americans.

[6] The statistical evidence in Fernandez's case showed that the prosecutor struck four out of seven (57%) Hispanics, thus supporting an inference of discrimination. While Hispanics constituted only about 12% of the venire, 21% (four out of 19) of the prospective juror challenges were made against Hispanics. Thus, the prosecutor disproportionately

struck Hispanics from the jury box, resulting in a statistical disparity. Those challenges, standing alone, were enough to raise an inference of racial discrimination.

[7] Regarding the African-American venirepersons, two challenges out of two venirepersons are not always enough to establish a *prima facie* case. Because the numbers were so small, two such challenges, standing alone, may not have been sufficient to support an inference of discrimination. However, the prosecutor's prior use of peremptory challenges against the prospective Hispanic jurors had given rise to a *prima facie* case of racial discrimination. Given the circumstances–that the prosecutor's behavior had already supported an inference of discrimination and that the trial court had expressly warned him against striking any more Hispanics–the prosecutor's subsequent strikes against the only two African-American venirepersons also supported an inference of racial discrimination. [8] Because a pattern of strikes against prospective jurors of a particular race can give rise to an inference of discrimination, and because the statistical

disparities indicated such a pattern, Fernandez established a *prima facie* showing of discrimination under *Batson.* The judgment of the district court had to be reversed.

COUNSEL

Susan Azad, Katherine Davis, Latham & Watkins, Los Angeles, California, for the petitioner-appellant.

Karl Terp, Robert B. Shaw, DAG, San Diego, California, for the respondents-appellees.

OPINION

W. FLETCHER, Circuit Judge:

Petitioner-Appellant Joaquin Leso Fernandez appeals the district court's order denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus challenging his 1995 state jury trial conviction for second degree murder. Petitioner contends that under *Batson v. Kentucky,* 476 U.S. 79 (1986), the prosecutor impermissibly exercised peremptory challenges to exclude four Hispanic and two African-American jurors in violation of the Equal Protection Clause. After *de novo* review pursuant to *Wade v. Terhune,* 202 F.3d 1190 (9th Cir. 2000), we hold that

the district court erred in finding that petitioner had not made a *prima facie* showing of discrimination. Accordingly, we reverse and remand.

I

Petitioner was a member of a Latino gang in Corona, California. In 1995, he was tried in California Superior Court in Riverside County for his alleged role in the killing of a member of another Latino gang. He was convicted of second degree murder and conspiracy to commit murder, and was sentenced to a term of fifteen years to life in prison.

Approximately sixty potential jurors were called for voir dire for petitioner's trial. Of these, seven were Hispanic, and two were African-American. The prosecutor exercised peremptory challenges to exclude four of the seven Hispanics. Of the remaining three, the trial judge excused one for cause; the defense exercised a peremptory challenge against one; and one was seated on the jury. The prosecutor exercised peremptory challenges against both of the African-Americans.

In the first round of challenges, without any direct questioning on voir dire by either the court or the prosecutor, the prosecutor struck Mr. Sanchez (2nd prosecutorial peremptory, 1st prosecutorial peremptory against a Hispanic). In the next round, the prosecutor struck Mr. Morales (9th peremptory, 2nd Hispanic) and Mr. Merendon (11th peremptory, 3rd Hispanic); both were struck without any direct questioning almost immediately after being seated in the jury box. In the third round, again without any questioning, the prosecutor struck Mr. Salcido (14th peremptory, 4th Hispanic).

After the prosecutor's challenge against Mr. Salcido, the defense objected under *People v. Wheeler,* 22 Cal. 3d 258 (1978), to all the prosecutor's peremptory challenges against the prospective Hispanic jurors. "In California, a *Wheeler* motion is the procedural equivalent of a federal *Batson* challenge." *Tolbert v. Gomez,* 190 F.3d 985, 987 (9th Cir. 1999) (citing *People v. Jackson,* 10 Cal. App. 4th 13, 21 n.5 (1992)). The trial court did not request an explanation from the prosecutor of his challenges, but the prosecutor volunteered

that the challenges were based on scores he had assigned to the juror questionnaires before voir dire had commenced. The record is unclear whether the identification of the prospective jurors' ethnicity had been requested on the questionnaires, but it is clear that their surnames did appear. The trial court did not review any of the juror questionnaires.[1/]

The trial court denied the *Wheeler* motion, stating that it did not appear that the prosecutor was systematically seeking to exclude Hispanics from the jury. The court relied on the fact that one Hispanic woman, Ms. Loya, had not yet been challenged and remained in the jury box, though subject to future challenge. The trial judge admonished, however, that "if there are any further Hispanics excused from the jury, that would cause me to conclude that a prima facie showing has been made." After this exchange, the prosecutor did not object to Ms. Loya, and she was seated on the jury.

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1. The trial court did, however, enter the questionnaires into the record for purposes of appeal, and they were filed in the Superior Court under seal. So far as we can determine, neither the California Court of Appeal nor the United States District Court has reviewed the questionnaires.

When voire dire continued, the prosecutor struck without any direct questioning Ms. Pleasant, the only prospective black juror in the jury box at the time (17th peremptory, 1st African-American). Then, during selection of the alternate jurors, the prosecution struck without any direct questioning Ms. Carter (20th overall, 2nd African-American). Ms. Carter was the only other African-American prospective juror in the venire.

After the peremptory challenge against Ms. Carter, the defense brought a second *Wheeler* motion, based on the State's exclusion of "people of color." The prosecutor stated that he had assigned Ms. Carter a low score and that she appeared disinterested in the process. The trial court concluded that no *prima facie* case of discrimination against African-Americans had been shown and denied the motion.

After trial, the jury returned a verdict of guilty for second degree murder and conspiracy to commit murder. The California Court of Appeal reversed the conspiracy conviction but otherwise affirmed. Applying the *Wheeler* standard, it held that petitioner had not shown a "strong likelihood" that the

prosecutor had challenged the prospective jurors on account of their race or ethnicity, and therefore petitioner had not established a *prima facie* case of discrimination. The Court of Appeal did not apply the standard of *Batson v. Kentucky,* 476 U.S. 79, 96 (1986), which requires only that a criminal defendant show facts and circumstances that "raise an inference" of exclusion based on race or ethnicity in order to establish a *prima facie* case.

Petitioner filed two unsuccessful petitions for habeas corpus in the California state courts. In 1997, petitioner timely filed the present petition for habeas corpus in federal district court, alleging, *inter alia,* that the state trial court erred in denying petitioner's motions objecting to the prosecutor's peremptory challenges. The district court adopted the Magistrate's Report and Recommendation, holding that the trial court did not err in finding that petitioner failed to establish a *prima facie* case of discrimination under *Batson,* and denying the petition with prejudice. Petitioner timely appealed.

II

We review de novo the decision of the district court to grant or deny a petition for writ of habeas corpus. *Wade*, 202 F.3d at 1194. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we may disturb a state court's determinations of law only if they are "contrary to" or "involved an unreasonable application of" clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). On a petition for habeas corpus, we normally review the state trial court's fact-specific determination of whether a defendant has made a prima facie case of a *Batson* violation deferentially, applying AEDPA's "statutory presumption of correctness." *Wade,* 202 F.3d at 1195 (quoting *Tolbert v. Page,* 182 F.3d 677, 685 (9th Cir. 1999) (en banc)). However, where the trial court has applied the wrong legal standard, AEDPA's rule of deference does not apply. Under these circumstances, we review *de novo* the question whether a defendant made a *prima facie* showing of a

Batson violation. *Id.* at 1199; *Copperwood v. Cambra,* 245 F.3d 1042, 1046-47 (9th Cir. 2001).

[1] As we recently held in *Wade,* California state courts following *Wheeler* have erroneously required a defendant to show a "strong likelihood" of discrimination in order to establish a *prima facie* case rather than just an "inference" of discrimination as required by *Batson. Wade,* 202 F.3d at 1197. In this case, the state trial court did not expressly articulate the "strong likelihood" standard in finding that petitioner had not established a *prima facie* case, but it treated both motions as *Wheeler,* rather than *Batson,* motions. When the California Court of Appeal affirmed the trial court's denials of petitioner's claims, it expressly employed the "strong likelihood" language of *Wheeler. See People v. Fernandez,* No. E016744 (Cal. Ct. App. Feb. 14, 1997) (unpublished disposition) ("To make a prima facie case, the party . . . 'must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias.'") (citation omitted and emphasis

added). The Court of Appeal did not mention *Batson* or its more lenient "inference" test. Because the California state courts applied an incorrect legal standard, contrary to federal law as pronounced in *Batson,* we review petitioner's *Batson* claims *de novo. Cooperwood,* 245 F.3d at 1047; *Wade,* 202 F.3d at 1197.

III

[2] Under *Batson,* a prosecutor's racially discriminatory use of peremptory challenges violates the Fourteenth Amendment's Equal Protection Clause. To bring a successful *Batson* challenge, a defendant must first establish a *prima facie* case by showing that (1) the defendant is a member of a cognizable group; (2) the prosecution has removed members of such a group; and (3) circumstances raise an "inference" that the challenges were motivated by race. 476 U.S. at 96. The burden then shifts to the prosecutor to articulate a race-neutral basis for the peremptory challenges. *Id.* at 97. Finally, the trial court must determine, in light of the *prima facie* case and

the prosecutor's explanation, whether the defendant has proven purposeful discrimination. *Id.* at 98.

[3] Petitioner argues that he established a *prima facie* case of a *Batson* violation. Both Hispanics and African-Americans constitute "cognizable groups" for *Batson* purposes. In *Powers v. Ohio*, 499 U.S. 400, 409-16 (1991), the Supreme Court held that a criminal defendant may object to race-based exclusion of jurors whether or not the defendant and the excluded jurors are of the same race. Petitioner, a Hispanic, thus permissibly can raise a *Batson* challenge based on the exclusion not only of Hispanics, but also of African-Americans, from the jury.

[4] The specific question before us is whether the circumstances of the prosecutor's challenges "raise an inference" of exclusion based on race, such that inquiry into the prosecution's motives is required under *Batson*. A pattern of exclusionary strikes is not necessary for finding an inference of discrimination. *See United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) ("[T]he Constitution forbids

striking even a single prospective juror for a discriminatory purpose."). But "[a] pattern of exclusion of minority venirepersons provides support for an inference of discrimination." *Turner v. Marshall,* 63 F.3d 807, 812 (9th Cir. 1995), *overruled on other grounds by Tolbert v. Page,* 182 F.3d 677 (9th Cir. 1999) (en banc). In *Turner,* we found a *prima facie Batson* violation where the prosecution exercised peremptory challenges to exclude five out of a possible nine (56%) African-American jurors. *Id.* In a number of other cases, with less striking disparities, we have assumed the existence of a *prima facie* case. *See, e.g., United States v. Lorenzo,* 995 F.2d 1448, 1453-54 (9th Cir. 1993) (three of nine Hawaiian jurors stricken); *United States v. Bishop,* 959 F.2d 820, 822 (9th Cir. 1992) (two of four African-American jurors stricken). Other circuits have found an inference of discrimination under similar circumstances. *See United States v. Alvarado,* 923 F.3d 253, 255 (2d Cir. 1991) (finding *prima facie* case of discrimination when prosecutor struck four of seven minority venirepersons).

[5] The *Turner* court relied not only on the high proportion of African-Americans stricken, but also on the *disproportionate rate* of strikes against African-Americans. *Turner,* 63 F.3d at 813. Although only about 30% of those called for voir dire had been African-American, the prosecution had used 56% of its peremptory challenges against African-Americans. In *Alvarado,* the prosecution used 50% of its challenges against minority venirepersons, who represented only 29% of the pool. *Alvarado*, 923 F.2d at 255-56. In *Turner,* we held that "[s]uch a disparity also supports an inference of discrimination." 63 F.3d at 813. Indeed, we relied only on the statistical disparities described above in finding a *prima facie Batson* violation. *Id.*

[6] In applying *Batson* to this case, we focus first on the prospective Hispanic jurors. The statistical evidence in this case is comparable to *Turner* as to both the proportion of available minorities stricken and the rate of such strikes. The prosecutor struck four out of seven (57%) Hispanics, slightly greater than the percentage in *Turner,* thus supporting an

inference of discrimination. While Hispanics constituted only about 12% of the venire, 21% (four out of nineteen) of the prospective juror challenges were made against Hispanics. At the time of the first *Wheeler* motion, after which the judge in effect warned the prosecutor not to strike any more Hispanics, the prosecutor had exercised 29% (four out of fourteen) of his challenges against Hispanics. Therefore, the prosecutor disproportionately struck Hispanics from the jury box, resulting in a statistical disparity similar to that in *Turner*. Those challenges, standing alone, are enough to raise an inference of racial discrimination.

[7] Focusing next on the African-American venirepersons, we note that the prosecutor struck the only two prospective African-American jurors. Two challenges out of two venirepersons are not always enough to establish a *prima facie* case. Because the numbers are so small (and, hence, potentially unreliable), two such challenges, standing alone, may not be sufficient to support an inference of discrimination. *See United States v. Vaccaro,* 816 F.2d 443, 457 (9th Cir.

1987), *overruled on other grounds by Huddleston v. United States,* 485 U.S. 681 (1988). In this case, however, the two challenges against African-Americans do not stand alone. Under *Batson,* we must consider "all relevant circumstances" surrounding the challenges. *Batson,* 476 U.S. at 96-97. Even before the prosecutor struck the first African-American venireperson (Ms. Pleasant), the prosecutor's prior use of peremptory challenges against the prospective Hispanic jurors had given rise to a *prima facie* case of racial discrimination. Given the circumstances–that the prosecutor's behavior had already supported an inference of discrimination and that the trial court had expressly warned him against striking any more Hispanics–the prosecutor's subsequent strikes against the only two African-American venirepersons also support an inference of racial discrimination.

The State defends the finding that Fernandez failed to establish a *prima facie* case by relying on two points: the fact that one Hispanic juror was ultimately seated, and the fact that the prosecutor said he relied on scores assigned to the juror

questionnaires. That one Hispanic juror remained on the jury, though helpful to the State, is not dispositive. *See Turner,* 63 F.3d at 814 ("In denying a *Batson* motion, . . . a trial court may not rely solely on the fact that some African-Americans remain on the jury."); *Montiel v. City of Los Angeles,* 2 F.3d 335, 340 (9th Cir. 1993) (stating that trial court "clearly erred" by refusing to conduct *Batson* inquiry where five of seven peremptory challenges were exercised against minorities even though one African-American woman remained on the jury, finding her presence to "only nominally" weigh against a *prima facie* showing). Indeed, in *Turner,* we found a *prima facie* case of discrimination despite the presence of four African-Americans on the seated jury. *See Turner,* 63 F.3d at 811-13. Further, the lone Hispanic juror's presence on the jury here is less helpful than the presence of African-Americans on the jury in *Turner* in light of the trial judge's explicit warning to the prosecutor that any additional challenges against Hispanics would trigger a *prima facie* finding of discrimination.

In relying on the prosecutor's explanation of his system for peremptory challenges based on the jury questionnaires, the State compares this case to *United States v. Ponce,* 51 F.3d 820 (9th Cir. 1995), in which the prosecutor offered its juror evaluations based on jury questionnaires. However, in *Ponce,* we were reviewing for "clear error," unlike the *de novo* review applied here. *Id.* at 830. Also, the trial court here never actually looked at the questionnaires to verify the prosecutor's claims that the low-scoring questionnaires indicated a bias against the judicial system or a desire to free the defendant. Moreover, the prosecutor's claim that he did not know the ethnicity of the prospective jurors when evaluating their responses may be questioned, given that their surnames appeared on the questionnaires. Finally, we note that the prosecutor failed to engage in meaningful questioning of any of the minority jurors.

[8] Case law suggests that we should not even consider the prosecutor's unsubstantiated explanations at the stage of determining whether a *prima facie* case exists. *See Alvarado,*

923 F.2d at 255 ("[T]he initial question is whether appellants presented a prima facie case sufficient to require explanations; that determination must be made *before* the explanations are considered.") (emphasis added). Upon our *de novo* review, we therefore are left with a bare record of statistical disparities of peremptory strikes against Hispanic and African-American venirepersons. Because a pattern of strikes against prospective jurors of a particular race can give rise to an inference of discrimination, *see Batson,* 476 U.S. at 97, and because the statistical disparities here indicate such a pattern, *see Turner,* 63 F.3d at 813, we find that petitioner has established a *prima facie* showing of discrimination under *Batson.*

Conclusion

For the foregoing reasons, we VACATE the district court's denial of Petitioner's habeas petition as to the *Batson* claim, and REMAND to the district court to conduct an evidentiary hearing, including review of the jury questionnaires, to determine whether there was a *Batson* violation in the trial court.

VACATED AND REMANDED.

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 02-70

In the Supreme Court of the United States

ERNIE ROE, WARDEN,

PETITIONER,

V.

JOAQUÍN LESO FERNANDEZ,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT JOAQUÍN LESO FERNANDEZ'S BRIEF IN OPPOSITION

SUSAN S. AZAD
KATHRYN M. DAVIS*
ULRIKE I. BOEHM
LATHAM & WATKINS
633 WEST FIFTH STREET,
Suite 4000
Los Angeles, CA 90071
(213) 485-1234

* Counsel of Record for Respondent

QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Court of Appeals err in finding that the California state courts applied an incorrect legal standard, contrary to federal law as pronounced in *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), when they expressly employed the "strong likelihood" test in *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (Cal. 1978), without reference to the more lenient "reasonable inference" test in *Batson*?

2. Did the Ninth Circuit Court of Appeals err in finding that, based on the facts and circumstances surrounding the prosecutor's exercise of a pattern of peremptory strikes against prospective jurors of a particular race, Fernandez established a *prima facie* showing of discrimination under *Batson*?

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In the Supreme Court of the United States

ERNIE ROE, WARDEN,

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JOAQUÍN LESO FERNANDEZ,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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RESPONDENT JOAQUÍN LESO FERNANDEZ'S BRIEF IN OPPOSITION

OPINIONS BELOW

Respondent Joaquín Leso Fernandez ("Fernandez") concurs with Petitioner Ernie Roe's recitation of Jurisdiction and the Statement of Constitutional and Statutory Provisions. Petitioner fails to provide a recitation of the Opinions Below.

The Opinion of the United States Court of Appeals for the Ninth Circuit is published in *Fernandez v. Roe*, 286 F.3d 1073 (9th Cir. 2002). (Appendix H at 73-98). The Report and Recommendation, Order Adopting the Report and Recommendation and Judgment of the United States District Court for the Central District of California are unreported. (Appendix D at 42-67, E at 68 and F at 69-70). The Opinion of the California Court of Appeals and the Order of the California Supreme Court denying Fernandez's state habeas petitions are likewise unreported. (Appendix C at 20-41 and D at 46).

STATEMENT OF THE CASE

I. Procedural History

Fernandez was tried in the Superior Court of the State of California for the County of Riverside for his alleged role in the death of a member of a rival gang, the "Brown Knights," on January 29-30, 1994. After a jury trial, he was convicted of one count each of second-degree murder and conspiracy to commit murder, and sentenced to a prison term of 15 years to life. (Petition at 2 and Appendix H at 74). On February 14, 1997, the California Court of Appeals issued an opinion reversing Fernandez's conviction for conspiracy to commit murder and affirming the judgment in all other respects. (Appendix C at 41). In that opinion, the California Court of Appeals further considered two motions brought by Fernandez during jury selection at his trial, contesting on the ground of racial bias the prosecutor's use

of peremptory challenges, and determined that the trial court did not err in finding that Fernandez had failed to establish a *prima facie* case of discrimination under *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (Cal. 1978). (Appendix C at 27). In making its determination, the California Court of Appeals did not apply the standard set forth in *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), which requires only that a criminal defendant show facts and circumstances that "raise an inference" of exclusion based on race or ethnicity in order to establish a *prima facie* case. Conversely, and expressly applying the *Wheeler* standard, it held that Fernandez had not shown a "strong likelihood" that the prosecutor had challenged the prospective jurors on account of their race or ethnicity, and therefore he had not established a *prima facie* case of discrimination. Thereafter, Fernandez filed two petitions for habeas corpus in the California state courts, both of which were denied by final order of the California Supreme Court on May 28, 1997. (Appendix D at 46).

On October 8, 1997, Fernandez filed in the District Court for the Central District of California a petition for writ of habeas corpus, alleging, *inter alia*, that the state trial court had erred in denying his *Wheeler* motions challenging the prosecutor's exercise of peremptory challenges to exclude from the jury panel four Hispanic and two black prospective jurors. (Appendix D at 43). On September 9, 1998, the district court adopted the Magistrate's Report and Recommendation, which determined that the trial court did not err in finding that Fernandez failed to establish a *prima facie* case of discrimination, and denied the petition with prejudice. (Appendix E at 68 and F at 69-70).

Fernandez timely appealed the district court's decision. On March 23, 2000, the Ninth Circuit Court of Appeals

granted a partial certificate of appealability with regard to the issue of whether the district court erred by denying Fernandez's claim that the trial court erred when it denied his *Wheeler* motions, in light of *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000), which had held that California courts following the *Wheeler* language apply an incorrect legal standard for the determination of a *prima facie* case under *Batson*, 476 U.S. 79. (Appendix G at 71-72). In an opinion filed April 8, 2002, the Ninth Circuit Court of Appeals determined that because the California state courts applied an incorrect legal standard, contrary to federal law as pronounced in *Batson*, Fernandez's *Batson* claims must be reviewed *de novo*. (Appendix H at 89). The Ninth Circuit further determined, upon conducting a *de novo* review, that Fernandez had established a *prima facie* case of discrimination under *Batson*. Accordingly, the Ninth Circuit vacated the district court's denial of Fernandez's habeas corpus petition as to the *Batson* claim and remanded to the district court to conduct an evidentiary hearing to determine whether there was a *Batson* violation in the trial court. (Appendix H at 97-98).

II. Factual Background

Fernandez concurs with the balanced summary of the relevant factual record contained in the Ninth Circuit Court of Appeals' opinion.

At Fernandez's trial, approximately 60 potential jurors were called for voir dire. (Appendix H at 82). Of these, seven were Hispanic, and two were African-American. (*Id.*) The prosecutor exercised peremptory challenges to exclude four of the seven Hispanics. Of the remaining three, the trial judge excused one for cause; the defense exercised a peremptory challenge against one; and one was seated on the jury. The prosecutor also exercised peremptory

challenges against both of the African-American members of the venire. (*See id.*)

In the first round of challenges, without any direct questioning by the prosecutor or the court, the prosecutor used his second prosecutorial peremptory to strike the first Hispanic veniremember. (*Id.* at 83). In the next round, the prosecutor used his 9th and 11th peremptory challenges to strike two more Hispanics; both were summarily struck without any direct questioning almost immediately after having been seated in the jury box. (*Id.*) In the third round, again without any questioning, the prosecutor used his 14th peremptory to strike a fourth Hispanic veniremember. (*Id.*)

After the prosecutor's challenge against the fourth Hispanic juror, Fernandez's trial counsel objected under *Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, to all the prosecutor's peremptory challenges against the prospective Hispanic jurors. (*Id.* at 83). The trial court did not request an explanation from the prosecutor of his challenges. (*Id.* at 83). However, the prosecutor volunteered that his challenges were based on scores he had assigned to juror questionnaires, upon which the prospective jurors' surnames appeared, before voir dire commenced. (*Id.*) The trial court did not review any of the juror questionnaires.

Without reviewing the questionnaires, the trial court denied the *Wheeler* motion, stating that at that time, it did not appear that the prosecutor was systematically seeking to exclude from the jury Hispanic prospective jurors. In so doing, the court relied on the fact that one woman, who appeared to be Hispanic, had not yet been challenged and remained seated in the jury box – though subject to future challenge. (*Id.* at 84). While it denied Fernandez's motion, the trial court admonished the prosecutor that "if there are

any further Hispanics excused from the jury, that would cause me to conclude that a *prima facie* showing [of discrimination] has been made." (*Id.*)

When voir dire continued, the prosecutor used his 17th peremptory challenge to strike the only African-American prospective juror in the box at that time – again without any direct questioning. (*Id.* at 85). Then, during the selection of the alternate jurors, the prosecutor exercised his 20th peremptory to strike, without any direct questioning, the second and only other African-American prospective juror in the venire. (*Id.*) After the prosecutor struck the second and only other black prospective juror, Fernandez's attorney brought a second *Wheeler* motion, based on the State's exclusion of "people of color." (*Id.*) The prosecutor again volunteered that he had assigned the black alternate juror a low score on her juror questionnaire and that she appeared to be disinterested in the process. Again without requiring the prosecutor to explain the use of his peremptories beyond what he had volunteered, and without reviewing any of the juror questionnaires, the trial court concluded that no *prima facie* case of discrimination against African-Americans had been established and denied the motion. (*Id.*)

REASONS FOR DENYING THE WRIT

The Petition does not identify any issue that even remotely merits this Court's attention. The heart of this case involves a collateral and belated challenge to a well-settled line of Ninth Circuit cases holding that the California state courts apply an incorrect legal standard, contrary to federal law as pronounced in *Batson*, when they expressly employ the impermissibly stringent "strong likelihood" test in *Wheeler*, without reference to the more lenient "reasonable inference" test in *Batson*. The Court of Appeals

applied this line of previously decided cases to the instant case; however, at no time prior to the instant Petition did Petitioner challenge the propriety of that application. The Court of Appeals did not announce a new rule of law or legal standard that is inconsistent in any way with the decisions of this Court or any other Court of Appeals.

The remainder of the Petition involves a challenge to the Court of Appeals' fact-specific determination that, based on the facts and circumstances surrounding the prosecutor's exercise of a pattern of peremptory strikes against Hispanic and African-American prospective jurors, Fernandez established a *prima facie* showing of discrimination under *Batson*. This aspect of the Court of Appeals' ruling is in complete accordance with the decisions this Court. The Petition mischaracterizes the issues presented and the holdings of the Court of Appeals, and the conflicts alleged are illusory.

I. THE NINTH CIRCUIT DID NOT ERR IN FINDING THAT THE CALIFORNIA COURTS APPLIED AN INCORRECT STANDARD OF LAW, CONTRARY TO FEDERAL LAW AS PRONOUNCED IN *BATSON*, WHEN THEY EXPRESSLY EMPLOYED THE "STRONG LIKELIHOOD" TEST IN *WHEELER* WITHOUT REFERENCE TO THE MORE LENIENT "REASONABLE INFERENCE" TEST IN *BATSON*

Petitioner erroneously contends that the Ninth Circuit erred in finding that the state courts applied an incorrect standard of law, contrary to clearly established federal law, when, in determining whether Fernandez had established a *prima facie* case of discrimination, they applied the "strong likelihood" test in *Wheeler* rather than the "reasonable

inference" test in *Batson*. Petitioner does not dispute that for purposes of this inquiry, *Batson* constitutes clearly established federal law. (Petition at 7). Neither does Petitioner refute that the Ninth Circuit is entitled to employ a *de novo* standard of review to federal constitutional claims once it has properly determined that the state courts employed a legal standard contrary to clearly established federal law. Rather, Petitioner first contends that the state courts' application of *Wheeler*'s "strong likelihood" test is not contrary to federal law because according to the California Supreme Court, in California, a "strong likelihood" means a "reasonable inference." (Petition at 8). Petitioner's argument is without merit.

In contending that the Ninth Circuit erred in finding the state courts' application of the "strong likelihood" test was contrary to federal law, Petitioner primarily challenges the propriety of the Ninth Circuit's prior ruling in *Wade*, 202 F.3d 1190. In *Wade*, decided in February of 2000, the Ninth Circuit considered for the first time whether California courts, in following the "strong likelihood" language of *Wheeler*, are applying the correct legal standard for a *prima facie* case under *Batson*. *See Wade*, 202 F.3d at 1197. In so doing, the Ninth Circuit expressly recognized the deferential standard of review set forth in Section 2254(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and properly concluded that state court determinations of law must be accorded deference on appeal unless they were "contrary to" or involved an "unreasonable application of" clearly established federal law. *Id.* at 1195. Nevertheless, according to the court, while the trial court's fact-specific determination of whether a defendant has established a *prima facie* case of discrimination under *Batson* is generally reviewed with great deference, where, as here, the trial court applies the wrong legal standard in

making the *prima facie* case determination, the standard rules of deference do not apply. *See id.* at 1195.

The court in *Wade* then went on to consider the question of whether *Wheeler*'s "strong likelihood" test is consonant with the "reasonable inference" test of *Batson*. In comparing the *Wheeler* and *Batson* standards, the Ninth Circuit examined closely California courts' construction of the *Wheeler* standard and concluded that at least since 1994, when a panel of the California Court of Appeals expressly disavowed any contention that the "strong likelihood" and "reasonable inference" tests were coterminous, the *Wheeler* and *Batson* standards were no longer consistent in California. *See id.* at 1196. The Ninth Circuit based its ruling on *People v. Bernard*, 27 Cal.App.4th 458, 32 Cal.Rptr.2d 486 (1994), a case in which the California Court of Appeals rejected previous holdings finding *Wheeler* and *Batson* compatible, and which concluded that:

> Although the *Fuller* court expressed doubt as to whether the Supreme Court in *Wheeler* in fact intended a threshold *prima facie* standard consisting of a "strong likelihood" in light of the ultimate "reasonable inference" test to be utilized by the trial court, we are convinced the Supreme Court intended the meaning of its carefully crafted language . . . and reject any dictum to the contrary.
>
> . . . To incorporate the "reasonable inference" standard into the *prima facie* showing might easily transform removal of each and every juror belonging to a cognizable group into a *Wheeler* hearing. Further, a reduction of the *prima facie* standard to a "reasonable

> inference" test would reduce the trial court's discretion and judgment at a time when it is uniquely situated to observe the nature and extent of voir dire as well as the attitude and awareness of the prospective juror.

Wade, 202 F.3d at 1196 (*quoting Bernard*, 27 Cal.App.4th at 465, 32 Cal.Rptr.2d 486).

Thus, according to the Ninth Circuit in *Wade*, since the California Court of Appeals explicitly rejected the idea that "reasonable inference" and "strong likelihood" mean the same thing, California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal constitution permits. *See id.* Significantly, the court in *Wade* further noted that since 1994, the California Supreme Court routinely insisted that, despite *Batson*, a criminal defendant must show a "strong likelihood" of racial bias. According to the court, while the California Supreme Court consistently cited *Batson* and *Wheeler* together as controlling law, it is solely the "strong likelihood" language from *Wheeler* that is quoted as the applicable constitutional standard, rather than the "reasonable inference" language from *Batson*. *See id.*

Thus, according to the Ninth Circuit in *Wade*, whenever the California courts follow the "strong likelihood" language of *Wheeler* without any indication that they are actually applying a "reasonable inference" test consonant with *Batson*, they apply an incorrect legal standard. In such cases, the state courts' determination of whether the defendant has established a *prima facie* case of discrimination will not be accorded deference, and a defendant's *Batson* claims will be reviewed *de novo*. *See id.* at 1197; *see also Cooperwood v. Cambra*, 245 F.3d 1042,

1046-1047 (9th Cir.), *cert. denied*, __ U.S. __, 122 S.Ct. 228, 151 L.Ed.2d 164 (2001) (following *Wade* and holding that a *de novo* standard of review applies whenever state courts use the "strong likelihood" standard, as these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits).

A. Petitioner Seeks to Collaterally Challenge Prior Ninth Circuit Rulings

Petitioner's belated challenge to the Ninth Circuit's holdings in *Wade* and *Cooperwood* is devoid of merit. Petitioner's ability, if any, to collaterally challenge *Wade* in the instant case has been waived.[1] Petitioner failed to challenge below the propriety of the Ninth Circuit's prior ruling in *Wade*. Indeed, at no point prior to the instant Petition has Petitioner argued that the Ninth Circuit's non-deferential approach to state court decisions relying on *Wheeler*, as expressed in *Wade*, *Cooperwood* and again in the decision below, is contrary to 28 U.S.C. § 2254 or this Court's opinion in *Williams v. Taylor*, 529 U.S. 362 (2000). The Ninth Circuit appointed counsel and ordered supplemental briefing precisely to address the issue of whether Fernandez established a *prima facie* case of discrimination in light of the standard of review set forth in

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[1] The State of California did not petition this Court for a writ of certiorari in *Wade*. Petitioner is arguably estopped from challenging the propriety of that decision now, over 2½ years later. A court's decision has issue preclusive effect if the decision has remained unappealed although such recourse would once have been available. *See Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 99 n.6 (1954); *see also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940) (litigation by one agency is binding on other agencies of the same government, unless there are important differences in the authority of the respective agencies).

Wade. Petitioner did not challenge the scope or application of that Order. To the contrary, in his briefing to the Ninth Circuit, Petitioner expressly conceded on two separate occasions that the Ninth Circuit's reasoning in *Wade* is controlling authority and must be applied to the instant case. *See* Appellee's Supplemental Brief at 8 (stating that pursuant to *Wade*, "[o]f course, this Court should conduct an independent review of the state court record" and arguing that "[c]onsistent with the decision of the district court, an independent review establishes that the decision of the state trial court was not made in violation of *Batson* and *Wade*"); *see also* Appellee's Brief at 8, 13-15 (acknowledging the applicability of *Wade* and arguing that the district court's independent review of Fernandez's *Batson* claim satisfied the requirements of *Wade*). The only question before the Ninth Circuit here was whether and to what extent, based on the state court record in the instant case, the California courts applied the "strong likelihood" or "reasonable inference" test in determining whether Fernandez established a *prima facie* case under *Batson*. The propriety of applying a *de novo* standard of review upon a finding that the state courts applied the incorrect standard contrary to federal law was never in question.

This Court has consistently emphasized that it will review only those issues which, before being presented in the petition, have been raised in or at least passed upon by the appellate court. *See, e.g., Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999) (declining to address issues that had not been sufficiently developed in the court of appeals); *NCAA v. Smith*, 525 U.S. 459, 469 (1999) (refusing to decide in the first instance issues that were not decided by the court of appeals); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) ("[f]inding no exceptional circumstances that would warrant reviewing a claim that

was waived below, we adhere to our general practice and decline to address respondent's [argument not raised in the district court or court of appeals]"); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (declining to consider arguments raised for the first time before this Court and not raised or resolved in the lower courts, absent unusual circumstances, because "allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart" the integrity of the certiorari procedure). Petitioner cannot now present for the first time a challenge that was not briefed, argued or passed upon below. Petitioner has failed to demonstrate or even argue the existence of exceptional circumstances necessary to justify a departure from this Court's general practice.[2] As such, Petitioner's collateral challenge to *Wade* and its progeny should be rejected.[3]

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[2] Only rarely has this Court held that it has power to consider an issue not reached by the court of appeals. *See Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976) (discussing "prudential" rule which the Court will disregard "only in the most exceptional cases," where reasons of urgency or of economy suggest the need to address the unpresented question). Fernandez submits that no such extraordinary circumstances exist in the present case. Petitioner was well aware of the issues raised by the Ninth Circuit's decision in *Wade* and, far from ever disputing those issues, in fact squarely agreed with *Wade* and accepted it as controlling authority when briefing the issue before the Ninth Circuit.

[3] Petitioner's invocation of the California Supreme Court's decision in *People v. Box*, 23 Cal.4th 1153, 99 Cal.Rptr.2d 69, 5 P.3d 130, 152 n.7 (Cal. 2000), does not change the result. The impact of that case on the analysis in *Wade* and its progeny was considered and rejected by the Ninth Circuit in *Cooperwood*, 245 F.3d at 1047. This Court denied a petition for a writ of certiorari in *Cooperwood* on October 1, 2001 – 18 months after this Court decided *Williams*, 529 U.S. 362. Here, as in *Cooperwood*, the California Supreme Court's decision in *Box* was handed down three years after Fernandez's conviction was affirmed by the Court of Appeals – during the period in which *Bernard* was still good law and California courts were applying an unconstitutionally relaxed standard of

B. The Ninth Circuit's Decision is Consistent with AEDPA and this Court's Decision in *Williams v. Taylor*

Even assuming Petitioner is permitted to belatedly and collaterally challenge the Ninth Circuit's decisions in *Wade* and *Cooperwood*, his claim fails. Petitioner fails to identify a conflict between *Wade* and the instant case on the one hand, and any decision of this Court on the other hand. Petitioner similarly fails to identify any conflict with other circuit courts, statutes or federal regulations. Notwithstanding Petitioner's claims to the contrary, the Ninth Circuit's decision below is in complete accord with Section 2254(d) of AEDPA and this Court's holdings in *Williams* and *Batson*. Section 2254(d) provides that an application for a writ of habeas corpus shall not be granted with respect to any claim adjudicated on the merits in state court proceedings, unless the adjudication of the claims resulted in a decision that was "contrary to" clearly established federal law. *See* 28 U.S.C. § 2254(d). As this Court in *Williams* made clear, a state court decision is deemed contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1) if either (1) "the state court applies a rule that contradicts the governing law set forth in [this Court's] cases"; or (2) "the state court confronts a set of facts that are materially indistinguishable

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scrutiny. *See Cooperwood*, 245 F.3d at 1047. Petitioner's reliance on *People v. Crittenden*, 9 Cal.4th 83, 36 Cal.Rptr.2d 474, 885 P.2d 887 (Cal. 1994) (Petition at 12) is similarly disingenuous. Notwithstanding Petitioner's suggestion to the contrary, the California Supreme Court in *Crittenden* did not employ the "reasonable inference" standard in *Batson* to defendant's *Wheeler* motion. To the contrary, that Court expressly stated that to establish a *prima facie* case of discrimination under both the federal and state Constitutions, the moving party must demonstrate a "strong likelihood" that prospective jurors are being challenged on the basis of group bias. *Id.* at 115, 36 Cal.Rptr.2d 474, 885 P.2d 887.

from a decision of [this Court] and nevertheless arrives at a result different from [such] precedent." *Williams*, 529 U.S. at 405-06; *accord Penry v. Johnson*, 532 U.S. 782, 792 (2001); *Ramdass v. Angelone*, 530 U.S. 156, 165-66 (2000). As such, the "contrary to" clause of Section 2254(d)(1) permits a federal court to grant writ relief "if the state court arrives at a conclusion opposite to that reached by [this Court] on a question of law." *Williams*, 529 U.S. at 412-13.

The phrase "contrary to" is defined as "diametrically different," "opposite in character or nature," or "mutually opposed." *Williams*, 529 U.S. at 405, *quoting* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976). The state court's decision, thus, must be "substantially different" from this Court's relevant precedent in order to be subject to the "contrary to" clause of Section 2254(d)(1). *Williams*, 529 U.S. at 405. State court decisions will certainly be contrary to clearly established federal law if the state court applies an incorrect legal standard which contradicts the governing legal standard of law articulated by this Court. *See id.* For example, as this Court discussed in *Williams*, if a state court rejected a prisoner's claim for ineffective assistance of counsel on the basis that he failed to establish by a preponderance of the evidence that the result of the criminal proceedings would have been different, that decision would be contrary to clearly established federal law as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires only that the prisoner establish a "reasonable probability" that the result of the proceeding would have been different. *See Williams*, 529 U.S. at 405-06. Significantly, as this Court further recognized, where the state courts apply a legal standard contrary to clearly established federal law, a federal court on habeas review will be "unconstrained" by the deferential standards of

AEDPA because the state courts' decision falls within the "contrary to" clause. *See id.* at 406.

Consistent with ~~this~~ Court's analysis in *Williams*, the Ninth Circuit below simply held that because the California state courts applied to Fernandez's claims an incorrect legal standard, contrary to federal law as pronounced in *Batson*, the deferential standards in Section 2254(d)(1) did not apply. (Appendix H at 89). Thus, based on this Court's reasoning in *Williams*, the Ninth Circuit's determination in *Wade*, *Cooperwood* and the instant case, that California's more stringent "strong likelihood" test is contrary to *Batson's* more lenient "reasonable inference" test, does not conflict with AEDPA or any decision of this Court. After properly determining that the state courts failed to employ the proper legal standard consonant with federal constitutional law, the Ninth Circuit was empowered to grant the writ pursuant to *Williams* and the "contrary to" exception of Section 2254(d)(1). Because a constitutionally infirm standard contrary to clearly established federal law was employed, the Ninth Circuit was "unconstrained by § 2254(d)(1)" and, as such, *de novo* review was appropriate. *Williams*, 529 U.S. at 405-06; *see also Romine v. Head*, 253 F.3d 1349, 1365 (11th Cir. 2001) (stating that "when there is grave doubt about whether the state court applied the correct rule of governing federal law, § 2254(d)(1) does not apply. That is what we have here, so we proceed to decide the issue *de novo*, as the district court did.").

C. The Ninth Circuit Properly Found That the California State Courts Applied an Incorrect Legal Standard

Petitioner next contends that the Ninth Circuit erroneously "inferred" that the state trial court failed to employ the correct legal standard. (Petition at 10). Petitioner further contends that the Ninth Circuit erroneously found that the California Court of Appeals applied the wrong legal standard simply because it used language from *Wheeler* instead of *Batson*. (*See id.*) Petitioner's claim lacks merit. As the record below makes clear, the Ninth Circuit properly found that while the trial court did not expressly articulate the "strong likelihood" standard in finding that Fernandez had not established a *prima facie* case of discrimination, it treated both of his motions as *Wheeler*, rather than *Batson*, motions. (Appendix H at 88-89). Moreover, when the California Court of Appeals affirmed the trial court's denial of Fernandez's claims, it expressly employed the "strong likelihood" language of *Wheeler*, stating that "[t]o make a *prima facie* case, the party . . . 'must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.'" (Appendix C at 27) (*citing People v. Turner*, 8 Cal.4th 137, 164, 32 Cal.Rptr.2d 762, 878 P.2d 521 (Cal. 1994)). Significantly, as the Ninth Circuit found, the Court of Appeals did not mention *Batson* or its more lenient "inference" test.

Petitioner further contends that even assuming the state courts applied *Wheeler*'s "strong likelihood" test rather than *Batson*'s "reasonable inference" test, the state courts' articulation of the applicable standard is not diametrically different than the *Batson* standard nor contrary to it in

character or nature. (Petition at 11). Petitioner's claims are devoid of merit. In *Williams*, this Court expressly recognized that state courts cannot employ a more stringent standard than that established by federal law. This Court defines the scope and content of the federal Constitution and this Court determines, absolutely, the constitutional floor with respect to a given constitutional right. A state court may not accord any lesser degree of protection than that required by the federal Constitution. Any deviation from the clearly established law of this Court, which results in the application an incorrect legal standard, falls within the "contrary to" provision of Section 2254(d)(1). On Petitioner's reasoning, and contrary to *Williams*, a state court's application of a "preponderance of the evidence" standard to an ineffective assistance of counsel claim would be entitled to deference because that standard, though incorrect, is not substantially different from Strickland's "reasonable probability" test. Under *Williams*, that argument fails.

II. THE NINTH CIRCUIT DID NOT ERR IN FINDING THAT, BASED ON THE FACTS AND CIRCUMSTANCES SURROUNDING THE PROSECUTOR'S EXERCISE OF A PATTERN OF STRIKES AGAINST PROSPECTIVE JURORS OF A PARTICULAR RACE, FERNANDEZ ESTABLISHED A *PRIMA FACIE* CASE OF DISCRIMINATION UNDER *BATSON*

Petitioner erroneously contends that the Ninth Circuit failed to conduct its review pursuant to AEDPA when it determined that the state courts' rejection of Fernandez's claims was an unreasonable application of clearly established federal law. Petitioner contends that the Ninth Circuit further erred when it found that Fernandez had

established a *prima facie* case of discrimination based "solely on a proportionality analysis gleaned from the record," which has no basis in this Court's clearly established law. (Petition at 15). Finally, Petitioner states that the state courts' determinations were not an unreasonable application of federal law. (*See id.*)

The Petition contains several significant misstatements of law and fact. The Petition states that the Ninth Circuit's decision contains no AEDPA analysis. This is patently false. (Appendix H at 87-89). The Petition further states that the Ninth Circuit found the state courts' determinations to be an unreasonable application of clearly established federal law. (Petition at 15). This, too, is false. Rather, as discussed above and consistent with this Court's analysis in *Williams*, the Ninth Circuit determined that the state courts' failure to apply the correct legal standard was contrary to federal law as pronounced in *Batson* and, as such, *de novo* review was appropriate. Nothing in the Ninth Circuit's opinion suggests that the "unreasonable application" provision of Section 2254(d)(1) was invoked. Indeed, as this Court noted in *Williams*, that provision applies only where the correct legal standard is identified but misapplied. *See Williams*, 529 U.S. at 407-08 (a state court decision involves an "unreasonable application" of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.").

Contrary to Petitioner's contentions, this was not a case involving the application of the correct legal rule and, as such, Petitioner's reliance on *Bell v. Cone*, __ U.S. __, 122 S.Ct. 1843 (2002) for the proposition that state court determinations of fact must be accorded deference on appeal, is inapposite. (Petition at 17). Rather, as this Court

recognized in *Williams*, where, as here, state courts apply the incorrect rule of law, federal courts "are unconstrained" by Section 2254(d)(1) because the state court decision falls within the "contrary to" clause.[4] *Williams*, 529 U.S. at 406. Thus, notwithstanding whether state court determinations of fact are normally accorded deference, the Ninth Circuit was entitled to review Fernandez's *Batson* claims *de novo*, "unconstrained" by Section 2254(d)(1).

Petitioner further contends that the Ninth Circuit, in finding that Fernandez had established a *prima facie* case of discrimination under *Batson*, erred in relying solely on a comparative statistical analysis and in instructing the state courts on how to implement *Batson* through the use of such a "formula." (Petition at 15, 21). The Petition misstates the facts. Nothing in the Ninth Circuit's opinion indicates that it instructed the state courts on how to implement *Batson* or on how to analyze the facts and circumstances surrounding the *prima facie* case determination. Rather, in accordance with *Batson* and its progeny, as well as longstanding Ninth Circuit precedent, the court simply engaged in a comparative proportionality analysis to determine whether and to what extent the prosecutor's exercise of peremptory strikes resulted in "systematic exclusion from the venire" of minority prospective jurors. *Batson*, 476 U.S. at 94. As this

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[4] The Petition contains additional misstatements of fact worthy of note. The Petition states that based solely on the information contained in the juror questionnaires, which did not include the race of the prospective jurors, the prosecutor assigned a score to each veniremember. (Petition at 18). It is unclear from the record whether in fact the juror questionnaires included the race of the jurors. However, it is clear that the questionnaires contained the surnames of the prospective jurors from which, arguably, the race of the prospective jurors could be surmised. Moreover, the record contains no evidence to support Petitioner's contention that the prosecutor's scoring system was based "solely" on the questionnaires.

Court has recognized, proof that members of the defendant's race were "substantially underrepresented on the venire" or that the prosecutor exercised a "pattern" of strikes against a cognizable class can give rise to an inference of discrimination sufficient to establish a *prima facie* case. *See id.* at 93-97. The Ninth Circuit's comparative proportionality analysis is a permissible means of determining the existence of "systematic exclusion" or a pattern of strikes. *See id.*

Notwithstanding Petitioner's contentions, the Ninth Circuit did not base its finding of a *prima face* case of discrimination solely on a comparative statistical analysis. To the contrary, in conducting its fact-bound analysis of the facts and circumstances surrounding the prosecutor's exercise of peremptory challenges to strike four of seven Hispanic and 100% of the black jurors in the venire, the Ninth Circuit considered several relevant factors consonant with this Court's decision in *Batson*. Indeed, in conducting its analysis, the Ninth Circuit expressly recognized that under *Batson*, it must consider "all relevant circumstances" surrounding the exercise of peremptory strikes (Appendix H at 94) and that while a pattern of exclusionary strikes is not necessary for finding an inference of discrimination, "'[a] pattern of exclusion of minority venirepersons provides support for an inference of discrimination.'" (Appendix H at 90-91) (citation omitted). Specifically, in addition to analyzing the statistical evidence in terms of both the proportion of available minorities stricken and the relative rate of such strikes, the Ninth Circuit also considered the prosecutor's behavior, the timing of the strikes, the trial court's admonition after the first *Wheeler* motion expressly warning the prosecutor against striking additional jurors, and the prosecutor's failure to engage in any meaningful questioning of any of the minority jurors. (Appendix H at

93-96). The Ninth Circuit's analysis is in complete accord with *Batson*. *See Batson*, 476 U.S. at 93-97 (stating that moving party may establish a *prima facie* showing by demonstrating a pattern of strikes, total or seriously disproportionate exclusion of a cognizable class, or systematic exclusion from the venire of a cognizable class, and further recognizing the relevance of opposing party's questions and statements during voir dire examination).

Finally, in concluding that the facts and circumstances surrounding the prosecutor's exercise of peremptory strikes established a *prima facie* case of discrimination, the Ninth Circuit recognized that it was "left with a bare record of statistical disparities of peremptory strikes against Hispanic and African-American venirepersons." (Appendix H at 97). However, in so concluding, the Ninth Circuit did not hold that, as a matter of law, a finding of statistical disparity is necessary or even sufficient to establish a *prima facie* case of discrimination. Rather, the court simply recognized that because a pattern of strikes against prospective jurors of a particular race can give rise to an inference of discrimination, and, because on the record in the instant case, the statistical disparities indicated such a pattern, Fernandez had established a *prima facie* case of discrimination under *Batson*. Moreover, as the Ninth Circuit indicated, because the prosecutor's unsubstantiated explanations for striking minority venirepersons should not be considered at the *prima facie* case stage (Appendix H at 96-97), reliance on a record of statistical disparities together with the absence of countervailing evidence may be all a reviewing court can consider.

CONCLUSION

For the reasons stated above, Fernandez respectfully requests that this Court deny Petitioner's petition for a writ of certiorari.

Respectfully submitted,

SUSAN S. AZAD
KATHRYN M. DAVIS*
ULRIKE I. BOEHM
LATHAM & WATKINS
633 West Fifth Street
Suite 4000
Los Angeles, CA 90071
(213) 485-1234

*Counsel of Record for Respondent

(3)

No. 02-70

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IN THE SUPREME COURT OF THE UNITED STATES

ERNIE ROE, Warden, *Petitioner,*

v.

JOAQUIN LESO FERNANDEZ, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
MEAGAN J. BEALE
Supervising Deputy Attorney General
KARL T. TERP
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2194
Fax: (619) 645-2191
Counsel for Petitioner

15 pp

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-70

ERNIE ROE, Warden, *Petitioner,*

v.

JOAQUIN LESO FERNANDEZ, *Respondent.*

Petitioner, Ernie Roe, Warden, (hereafter Petitioner), respectfully submits this Reply to Respondent Joaquin Leso Fernandez's Opposition to Petition for Writ of Certiorari. Pursuant to Rule 15.6, Petitioner addresses only new points raised in Fernandez's opposition brief.

I.

THE NINTH CIRCUIT DECISION IS CONTRARY TO THIS COURT'S DECISION IN *BATSON* AND ITS DECISIONS CONCERNING AEDPA REVIEW

Fernandez erroneously maintains California trial courts and courts of review apply a stricter standard for establishing a prima facie showing that a party is exercising a peremptory challenge based upon a claim of group bias than required by this Court's holding in *Batson v. Kentucky*, 476 U.S. 79 (1986). Opp'n at 16-17. Fernandez also erroneously argues that the comparative and statistical analysis routinely employed by the Ninth Circuit on review of a state trial court's decision on

habeas corpus is consistent with *Batson* and its progeny. Opp'n at 19-21. Initially, however, Fernandez asserts the arguments which Petitioner makes are waived. Opp'n at 10-12. Fernandez avers that even if Petitioner's claims are not waived, the Ninth Circuit's decision in the instant case is not in conflict with this Court's jurisprudence regarding AEDPA[1] nor in conflict with any of the other federal circuit decisions. Opp'n at 13-15. These arguments contain several serious flaws and actually support a grant of certiorari by this Court.

Petitioner will not respond to each and every point made by Fernandez because most are adequately addressed in the Petition for Writ of Certiorari. Similarly, Petitioner will not respond to Fernandez's multiple claims of factual misrepresentation. The record speaks for itself. In fact, Fernandez's Brief in Opposition makes several factual misrepresentations. For example, Fernandez claims the state trial court expressly applied the standard in *Wheeler*[2] rather than *Batson* because it "treated both of [Fernandez's] motions as *Wheeler*, rather than *Batson*, motions." Opp'n at 16. But Fernandez fails to acknowledge the fact he brought "*Wheeler* motions" rather than "*Batson* motions." App. A at 3; App. B at 15; App. H at 75.

A. The Ninth Circuit Misapplied The AEDPA By Using Its Own Circuit Authority As Clearly Established Law For Purposes Of Reviewing A State Court Decision

Fernandez claims California's standard for establishing a prima facie showing that a peremptory challenge was exercised on the basis of group bias is contrary to this Court's decision in

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1. Antiterrorism and Effective Death Penalty Act of 1996.

2. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

Batson. Opp'n at 12-15 including n.3. Attempting to make this point, Fernandez compares this Court's language in *Batson* for assessing a prima facie showing – "a reasonable inference" – with the Court's standard in *Strickland v. Washington*, 466 U.S. 668 (1984) for assessing prejudice for purposes of establishing ineffective assistance of counsel – "a reasonable probability" the result would have been different. Opp'n at 14-15. Fernandez reasons language commonly articulated in California regarding the prima facie test for a *Batson* motion – "a strong likelihood" – is contrary to the language in *Batson* requiring "a reasonable inference," just as using a "preponderance of the evidence" standard for determining prejudice would be contrary this Court's holding in *Strickland*. Opp'n at 14-17. Fernandez's point fails.

While Fernandez frequently references *Wheeler* as the standard California employs for determining whether a prima facie showing is established, Fernandez never recognizes the fact this Court favorably cited *Wheeler* in *Batson* or the fact the standard in *Batson* derives directly from *Wheeler*. The California Supreme Court has consistently maintained that the standard articulated in *Wheeler*, requiring the moving party to show a "strong likelihood" that a peremptory challenge was based on group bias, is the same showing set down in *Batson* requiring a "reasonable inference." The state court's decision was not "contrary to" this Court's established authority, even if different language was employed by the state court. See *People v. Box*, 23 Cal. 4th 1153, 1187-88, 5 P.3d 130, 99 Cal. Rptr. 2d 69 (2000); *People v. Crittenden*, 9 Cal. 4th 83, 115, 885 P.2d 887, 36 Cal. Rptr. 2d 474 (1994).

Attempting to make his point, Fernandez illustrates the very reason for this Court's review; that is, the Ninth Circuit has developed "a well-settled line" of cases erroneously finding California misapplies this Court's holding in *Batson*. Opp'n at 5, 19. This "well-settled line" of Ninth Circuit authority is not only unsupported by this Court's jurisprudence under the AEDPA but also is contrary to this Court's holding in *Batson*,

itself. Consequently, the Ninth Circuit's decision, and those upon which it relies, demand this Court's review. In essence, the Ninth Circuit has provided itself with an excuse – a finding that *Wheeler* is inconsistent with *Batson* – to ignore state court findings of fact involving *Wheeler/Batson* claims – a fact driven issue – by reviewing the facts developed in state court de novo rather than with deference. This, despite the fact that the state trial court deciding the motion is best situated to make the necessary determinations to decide the motion. *Batson*, 476 U.S. at 98, including n.21. Then, the Ninth Circuit tests the facts under a standard of its own making, namely statistical and comparative analysis.

B. Petitioner Is Not Estopped From Challenging The Underpinnings Of The Ninth Circuit's Decision

Fernandez erroneously asserts Petitioner waived the right to contest the decisions underlying the Ninth Circuit's reasoning. Fernandez argues Petitioner cannot challenge the prior decisions relied upon by the Ninth Circuit to resolve this case. Opp'n at 6-12. This argument lacks support in law or logic.

Petitioner is challenging the entirety of the decision below, which necessarily includes the reasoning, and therefore the prior decisions, upon which the Ninth Circuit relied. The authorities which Fernandez cites in support his waiver argument are inapposite to his argument. The assorted cases Fernandez cites concern arguments made and issues asserted for the first time ***following*** the grant of certiorari and not issues raised in a petition for writ of certiorari in the first instance. *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999) [reversing lower court decision, this Court declined to address alternative grounds for affirming when certiorari limited to single issue]; *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 462, 469-70 (1999) [declined to address alternate theories supporting lower court decision asserted after certiorari granted]; *United*

States v. Alvarez-Sanchez, 511 U.S. 350, 360 n.5 (1994) [following grant of certiorari, this Court declined to address alternate theory for affirming decision below based upon a different constitutional amendment].

Fernandez predicates his waiver claim on Petitioner's challenge to the underpinnings of two Ninth Circuit decisions relied upon in this case which were not appealed by the state at the time; specifically, *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000) and *Copperwood v. Cambra*, 245 F.3d 1042 (9th Cir. 2001). Opp'n at 10-12, including ns. 1 & 3. Fernandez points to the fact *Wade* and *Copperwood* were not challenged either in the Ninth Circuit or to this Court, and reasons a "collateral attack" should now be precluded. Opp'n at 10-12, including ns. 1 & 3. Fernandez's analysis is fallacious because it overlooks the results in *Wade* and *Copperwood*. The decisions in *Wade* and *Copperwood* upheld the state courts' denials of the *Wheeler/Batson* motions, albeit, the Ninth Circuit employed an erroneous standard of review in doing so. Pet. for Cert. at 12-13, ns. 4 & 6. For the state to have challenged the *Wade* and *Copperwood*[3] decisions on the *Wheeler/Batson* issue either in the Ninth Circuit or in this Court would have been pointless, if not futile. See Sup. Ct. R. 10.

Petitioner is not simply challenging the *Wade* and *Copperwood* decisions. Rather, Petitioner is challenging the entirety of the decision below, which relied upon the reasoning in *Wade* and *Copperwood*. Fernandez's diaphanous invocation of the waiver doctrine to prevent review of a line of authority employing an erroneous legal standard highlights the need for this Court to grant the instant petition.

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3. As Fernandez notes, Copperwood filed a petition for writ of certiorari before this Court which was denied on October 1, 2001. Opp'n at 12 n.3.

C. A Split Exists Between State And Federal Courts Concerning The Review Of *Batson* Motions, And The Ninth Circuit's Decision Conflicts With This Court's Authority On AEDPA Review

Fernandez also claims Petitioner failed to identify a conflict between the Ninth Circuit's decision and a decision by this Court or another federal circuit court. Opp'n at 13. This point requires a twofold response. First, the state and federal appellate courts split on how and what to review concerning a *Batson* motion ruling. Second, the AEDPA review employed by the Ninth Circuit in the instant case conflicts with established authority of this Court.

First, state and federal courts split on the use of comparative and statistical analysis for purposes of reviewing the denial of a *Batson* motion, particularly, the finding of the prima facie showing. The Ninth Circuit routinely engages in comparative and statistical analysis when reviewing a trial court denial of a *Batson* motion, as it did in Fernandez's case, even though it acknowledges there is no authority in this Court's jurisprudence for engaging in such analysis. *Burks v. Borg*, 27 F.3d 1424, 1427 (9th Cir. 1994). The Seventh Circuit recently held *Batson* ***mandated*** comparative analysis on federal review of the denial of a *Batson* motion by an Illinois state court, despite the fact no comparative analysis was offered at the time of the *Batson* motion and the Illinois Supreme Court rejects comparative analysis for purposes of *Batson* review. *Henderson v. Walls*, 296 F.3d 541, 548, 551 (7th Cir. 2002). On the other hand, California, Illinois, Missouri and Texas reject the use of comparison and statistical analysis on review when no such analysis was offered in the trial court where the *Batson* motion was made. *People v. Ervin*, 22 Cal. 4th 48, 74-76, 990 P.2d 506, 91 Cal. Rptr. 2d 623 (2000); *People v. Henderson*, 142 Ill. 2d 258, 154 Ill. Dec. 785, 568 N.E.2d 1234, 1244-1250 (1990), *cert. denied, sub nom., Henderson v. Illinois*, 502 U.S. 882 (1991); *State v. White*, 753 S.W.2d 52, 55 (Mo. App

1988); *Vargas v. State*, 838 S.W.2d 552, 556-557 (Tex. Cr. App. 1992); *Turner v. State*, 861 S.W.2d 36, 38-39 (Tex.App.–Houston (14th District) 1993).

Even the federal circuit courts differ on the use of statistical and comparative analysis for *Batson* claims. The Second Circuit has held a prima facie showing under *Batson* can be established based solely on a statistical percentage analysis, even when the record does not definitively establish the actual percentages. *United States v. Alvarado*, 923 F.2d 253, 255-256 (2nd Cir. 1991). However, the Eighth Circuit rejects the idea of reviewing the question of a prima facie showing based solely on considering a statistical analysis. *United States v. Lewis*, 892 F.2d 735, 736-737 (8th Cir. 1989); *United States v. Montgomery*, 819 F.2d 847, 850-851 (8th Cir. 1987).

Indeed, there is considerable disparity – or division – amongst the state and federal courts regarding the review of a *Batson* motion. In the instant case, the Ninth Circuit employed both a comparative and statistical analysis which was not offered by Fernandez in the trial court. Contrary to Fernandez's assertion (Opp'n at 20-21), there is no law from this Court expressly condoning the use of comparative or statistical analysis for purposes of reviewing the denial of a *Batson* claim. Rather, this Court's decision in *Batson* suggests such analysis is inapprorpriate because *Batson* addressed "the defendant [carrying] his burden of persuasion" and not whether an appellate court can find reasons by making calculations from the record which would have supported the burden of persuasion had it been brought to the trial court's attention. *Batson*, 476 U.S. at 93, 96-98. Furthermore this Court declined to formulate particular procedures for the implementation of its decision in *Batson*, recognizing the wide variety of methods employed for jury selection in the state and federal courts. *Batson*, at 99 including ns.23 & 24. Therefore, federal court review of a *Batson* motion decided in state court should be restricted to the factors raised in deciding the motion and sensitive to the state court's jury selection process. Nothing in this Court's

jurisprudence justifies a statistical or comparative analysis as the litmus test for the correctness of a *Batson* ruling.

Wade, *Copperwood* and the instant case contravene the standards of review set forth in the AEDPA. The California Supreme Court has repeatedly confirmed that this Court's holding in *Batson* governs the standard in California courts for a prima facie showing that a party is exercising a peremptory challenge on the basis of group bias. Pet. for Cert. at 7-8. Nonetheless, the Ninth Circuit's decisions ignore or reject this fact, and employ a standard of review of its own making to find California's implementation of *Batson* is "contrary to" that decision. App. H at 87-89.

Indeed, Petitioner identified two decisions by this Court which conflicted with and overruled Ninth Circuit opinions regarding the determination whether a state court decision is "contrary to" a decision by this Court – *Bell v. Cone*, ___ U.S. ___, 122 S. Ct. 1843, 1852, 152 L. Ed. 2d 914 (2002) and *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Pet. for Cert. at 9-10. The law in California regarding the prima facie showing that a party has exercised a peremptory challenge based upon group bias is not "diametrically different", "opposite in character or nature" or "mutually opposed" to this Court's decision in *Batson*. *Bell*, at 1852; *Williams*, at 405. Fernandez does not argue otherwise, but rather relies upon the faulty analysis in *Wade*. Furthermore, currently before this Court is a case addressing AEDPA review in the context of the denial of a *Batson* motion – *Miller-El v. Cockrell*, case No. 00-7662, *cert. granted*, ___ U.S. ___, 122 S. Ct. 981, 151 L. Ed. 2d 963 (2002). The instant case evinces further need for this Court to address the AEDPA constraints in the context of review of a *Batson* motion on federal habeas corpus.

CONCLUSION

Based on this reply and the Petition for Writ of Certiorari, the Petition should be granted.

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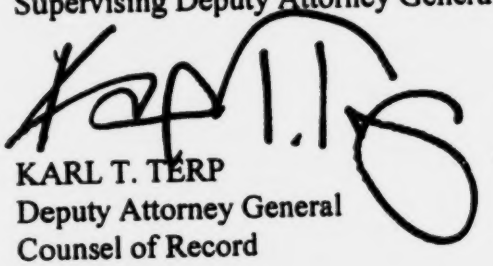
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

MEAGAN J. BEALE
Supervising Deputy Attorney General



KARL T. TERP
Deputy Attorney General
Counsel of Record

Counsel for Petitioner